

Roads Authority and Roads Fund Administration v Al-Abdulhadi Engineering Consultancy

Court:	Supreme Court Of Appeal
Bench:	Honourable Justice D. Madise, JA.
Cause Number:	Civil Appeal Number 22 of 2023 (Being Commercial Case No. 459 of 2022)
Date of Judgment:	March 14, 2024
Bar:	Mr. P. Likongwe, Counsel for the Appellants Mr. L. Gondwe, Counsel for the Respondent

Head Notes

Civil Procedure -Appeal – Stay of Execution – Discharge of Stay – Application for discharge of stay dismissed for being res judicata and ill-conceived

Civil Procedure -Supreme Court of Appeal – Single Member – Jurisdiction – Single member may not determine an appeal but can exercise ancillary powers

Civil Procedure -Appeal – Prosecution of Appeal – Non-compliance – Breach of procedural rules must be substantial to warrant discharge of a stay

Civil Procedure -Judgments and Orders – Stay of Execution – General Rule – Successful party entitled to the fruits of litigation; stay is not of right

Summary

The Respondent sought the discharge of an order granted by a Single Member of the Supreme Court of Appeal, which had previously stayed the execution of a default judgment and directed that the judgment sum be paid into Court pending appeal. The dispute originated when the Respondent, as Claimant, commenced proceedings in the High Court, Commercial Division, and obtained a Freezing Injunction and a Default Judgment against the Appellants (Defendants) for **US\$1,481,948.30**. The default judgment was executed swiftly, with the bank paying the sum to the Respondent's lawyers. Shortly thereafter, the money was frozen by the Financial Intelligence Authority and subsequently preserved by a High Court Order until the determination of the Appellants' application to set aside the Freezing Injunction and the Default Judgment.

When the High Court dismissed the Appellants' applications, they were granted leave to appeal but refused a stay of execution. The Appellants then successfully applied to a Single Member of the Supreme Court of Appeal, who dismissed the Respondent's parallel application to have the preserved money paid out, granted a stay of execution, and ordered that the funds be paid into the Supreme Court. In the present application, the Respondent contended that the stay should be discharged because the Appellants had allegedly failed to prosecute the appeal properly by not filing skeleton arguments within the prescribed period, arguing that the Respondent, as the successful litigant, was entitled to the fruits of the judgment. The principal legal questions were whether discharge was the appropriate remedy for alleged procedural default, and what guarantees existed for the return of the funds given the Respondent's foreign establishment.

The application was dismissed. The Court held that the Respondent's contention that no valid appeal was lodged was misconceived and noted that the Court had previously heard and denied the Respondent's application to release the funds, thereby rendering the issue of whether an appeal was properly lodged *res judicata* before a Single Member. The Court also emphasized that the default judgment in question was not a decision on the merits, and the balance of justice favoured allowing the Appellants to have the substantive merits of their case heard before the full bench, particularly since the judgment sum was secured in Court. The Court ordered that the Appellants obtain a date for the hearing of the substantive appeal within 21 days

Legislation Construed

Statutes

Supreme Court of Appeal Act (s 7)

Subsidiary legislation

Supreme Court of Appeal Rules (Order I Rule 18)

Judgment

Introduction

This matter came before me as a single member of the Court pursuant to Section 7 of the Supreme Court of Appeal Act hereinafter referred as the Act as read with Order I Rule 18 of the Supreme Court of Appeal Rules. Section 7 of the Supreme Court of Appeal Act states:

“A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:

Provided that –

(a) in criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;

(b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.”
(emphasis added)

The Respondent (then Claimant in the Court below) commenced these proceedings in the High Court (Commercial Division) Blantyre Registry on 9th December 2023 but served the summons on the Appellants (then Defendants) on 11th January 2023. The Respondent also obtained a Freezing Injunction ex-parte, freezing all the Appellants' assets. All the Appellants' bank accounts were also frozen. The Appellants filed an Application to set aside the Freezing Injunction. On 8th February 2023 the Respondent filed an Application for a Default Judgment and the Court below issued the Default Judgment on the same day 8th February 2023. The Default Judgment ordered NBS Bank plc to immediately pay the sum of US\$1,481,948.30 to the Respondent. NBS Bank paid the sum of US\$1,481,948.30 to the Respondent's lawyers, Ritz Attorneys on 9th February 2023.

The Appellants (Defendants in the Court below) filed an application for stay of execution of the Default Judgment. At more or less the same time the Financial Intelligence Authority (FIA), on its own initiative for other reasons on 10th February 2023 issued a Freezing Directive against the bank account of Ritz Attorneys at Ecobank. Thus, the money remained at Ecobank. On 10th February 2023 the Appellants (then Defendants) filed an Application to set aside the default judgment on the grounds of irregularity and on the further ground that the Defendants (now Appellants) have defences on the merits. The Defences were exhibited in the sworn statement in support of the application. The Appellants (then Defendants) also filed skeleton arguments in which the defences were also highlighted. On 24th February 2023 the Appellants (then Defendants) filed a without notice application to vary the order for stay of enforcement to include a paragraph that the sum of US\$1,481,948.30 that NBS Bank plc sent to Ecobank Malawi Ltd be preserved by Ecobank Malawi Ltd until the determination of the Application to set aside the default judgment. The Order

adding a paragraph on preservation of the funds was issued on 29th March 2023.

The Appellants' applications to set aside the Freezing Injunction and to set aside the Default Judgment were heard on 21st February 2023. After the hearing, both parties filed and served their Submissions on both applications. The Ruling on the two applications to set aside the Freezing Injunction and to set aside the Default Judgment is dated 4th May 2023. The Ruling dismissed the Defendants' (now Appellants') two applications with costs. The Ruling however maintained the Order for the money to be preserved by Ecobank for a further 7 days. On 5th May 2023, the Appellants filed a without notice application in the Court below for leave to appeal and stay of proceedings pending appeal. The Court below granted the leave to appeal but declined the application for stay of execution.

The Appellants obtained leave to appeal and have appealed to the Malawi Supreme Court of Appeal against the ruling of the Court below dated 4th May 2023. The Respondent filed an application in the Supreme Court of Appeal to have the money preserved at Ecobank paid out to the Respondent. The Appellants also filed an application for stay of execution of the ruling of the Court below. Both applications were opposed. The Single Member of the Supreme Court of Appeal heard both applications together on 20th June 2023 and dismissed the Respondent's application to pay the money out to the Respondent, granted a stay of execution of the ruling of the Court below and ordered that the money at Ecobank be paid into Court. Meanwhile the funds remain in Court. The Appellants processed the record of appeal in the High Court and the record of appeal which contains the Appellants' Skeleton Arguments was filed in the Supreme Court of Appeal and served on the Respondent.

Respondent's arguments for discharge of stay of execution.

The Respondent stated that he is not looking for much in this application. That he is not saying the Appellants cannot continue to prosecute their appeal. The Respondent has considered on a clear conscience that there is in fact no appeal properly before the Court. That the Respondent is simply asking the Court to discharge its orders which it granted on the pretext that there is a proper appeal logged with the Court. As true verification of the Court would have it, there is none and the status quo should remain that which obtained when the Appellants had not filed a purported appeal.

Legal issues

Whether discharge of the stay is the most appropriate remedy for failure to file skeleton arguments within the prescribed period.

Whether a stay should be discharged in favour of a party who does not have establishment in Malawi.

What guarantees are there that if the discharge is granted and later the Default Judgment is set aside, the Respondent will pay back the Judgment Sum?

Law, analysis and submissions

The Respondent argued that a successful party to litigation must enjoys fruits of litigation. He cited *Kadzipatike & Others v Zhejiang Communications Construction Group Company Limited* (MSCA Misc. Civil Application No. 29 of 2023, Being High Court, Commercial Division, Lilongwe Registry, Commercial Case No. 78 of 2020) [the Zhejiang case]. That the old position remains that : fruits of litigation vs appeal being rendered nugatory should be considered. The old cases state that the general rule is that the court does not make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he is “entitled” pending an appeal. This principle has been repeated by the courts in Malawi with approval on several occasions without number.

That where a justifiable reason emerges negating the need for stay, the right of a successful party to enjoy the fruits of litigation will be upheld and stay will be deemed unjust or unnecessary in the circumstances. That a stay in favour of an appellant is not as of right. The right is for the Respondent to be entitled to fruits of litigation. The only exception to this rule is where if a stay is not granted, or where it was granted, is subsequently discharged, the Appellant’s intended appeal will be rendered nugatory. That it is important to emphasise that the Appellants herein are beneficiaries of not a general but merely an exception to it. He submitted that the Court should be slow to deny a party fruits of litigation. Parties who benefit from this exception must be only those who are willing to pursue their appeal in good faith and in compliance with law. That where damages can adequately compensate the Appellants in the event of a successful appeal, a stay should be refused or if it was granted and there is a good reason it must be discharged. As i such as in the present case where it is clear that the Appellant has not followed applicable procedural law in prosecuting the appeal, the

stay should be discharged and the Respondent should be allowed to exercise his right to enjoy fruits of litigation.

That not to discharge the stay where there is glaring breach by the Appellants of procedural rules will be to recognise that the stay was granted as of right and to refuse to discharge the stay when clearly the Appellants have breached what was required of them is to further deny a Respondent fruits of litigation. That this will be in contravention with the general principle that a stay is not as of right and that an appeal does not operate as a stay. On this aspect, the Court is further invited to consider the principles of stays of judgments of the Court in determining whether to discharge or maintain the stay. He submitted that at any time in the proceedings, the principles for grant of stay also guide Courts in our jurisdiction when they are faced with applications for discharge of stay. He cited the remarks of the Honourable Justice Tambala in the case of *The Anti- Corruption Bureau v Atupele Properties Limited* (MSCA Civil Appeal Number 27 of 2005) [the Atupele Properties case] are quite key in the present matter. The Court said;

I must now revert to the law relating to stay of execution of Court's judgements. There are clearly four principles. The first is that it lies within the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as a general rule the court must not interfere with the successful party's right to enjoy the fruits of litigation. The third principle is an exception to the general rule and states that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the Appeal succeeds, execution of the court's judgement may be stayed. The fourth

principle is that even where the party appealing is able to show that the successful party would be unable to pay back the damages if the appeal succeeds, the court may still refuse an application for stay of execution of a judgement if upon examination of the facts of the case, an order of stay of execution would be utterly unjust.” [emphasis by underlining ours].

That the remarks of this Court in the Atupele Properties case (supra) should be examined very closely in the present case. In terms of the first principle expounded by the Court, it is conceded that grant or discharge of stay is in the discretion of the Court. The Court may grant or discharge stay in exercise of its discretion but on the guidance of the other three principles. That in terms of the second principle, the Court recognises that the right to have a judgment stayed is not for the appellant. It is for the party who obtained the judgment in its favour and that Courts should protect the successful party's right to enjoy fruits of litigation. It is submitted that the Court should look at the facts and consider that the Respondent has been kept out of its Judgment Sum for over a year now. The Respondent has not been able to access its money even where it is now clear that the Appellants are pursuing their appeal in breach of rules of procedure while enjoying existence of a stay of execution.

That the third principle for grant or discharge of stays is, as expounded by the Court, that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the Appeal succeeds, execution of the court's judgement may be stayed. It is observed that the third principle is not a standalone principle. It is merely an exception to the general rule which is that a successful party must enjoy fruits of litigation and Courts are duty-bound to protect the successful party's right. The exception to the said

general rule is not to be exercised in favour of an appellant unconditionally. There is a condition to the third rule. The condition is that the Appellant must demonstrate that the successful litigant would be unable to pay back damages if the appeal succeeds. Conversely, in the context of determination of an application for discharge of a stay, he submitted, that the third principle imposes an obligation that over and above simply being a foreign entity without establishment in Malawi, the Respondent has no capacity to pay back damages to the Appellants should their appeal succeed.