IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Civil Appeal No. 83 OF 2019
(Being High Court (Lilongwe Commercial Division) Commercial Case No: 14 of 2015)

BETWEEN

NBS BANK PLC.....DEFENDANT/APPELLANT

AND

DEAN LUNGU t/a DEANS ENGINEERING CO LTD...CLAIMANT/RESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA
Mpaka of Counsel, for the Appellant
Kita of Counsel, for the Respondent
Masiyano, Court Clerk

RULING

Kamanga, JA

1. *Introduction*

1.1 On 16th October, 2019, NBS Bank PLC (the "Appellant") filed an application for an order for a stay of the execution of a "default order" of the High Court (Lilongwe Commercial Division) in Commercial Case No: 14 of 2015, delivered on 19th June, 2018, pending appeal against the Ruling of the court below delivered on 3rd September, 2018, (the "Appellant's application herein") on the grounds that in the circumstances of the case the interest of justice require that there be a stay, pending appeal. The Appellant's application herein is stated to be made pursuant to Order I, rule 18 of the Supreme Court of Appeal Rules and Part 52.7 of the Civil Procedure Rules as read with section 7 of the Supreme Court of Appeal Act. The Appellant's application herein is supported by an affidavit of Counsel Mpaka which will only be specifically referred in so far as is relevant to determine a specific issue.

1.2 The Appellant's application herein was issued on 18th October, 2019, and the hearing of the application was set down for, and was heard on, 25th October, 2019.

1.3 On 23rd September, 2019, the Appellant filed skeleton arguments and a list of authorities in support of its application. On the same date the Appellant also filed a supplementary affidavit in support of the application. The gist of the supplementary affidavit is that, despite the fact that the default judgment of 19th June, 2018, was made in favour of "Dean Lungu t/a Dean's Engineering Limited", the Registrar of the court below had on 22nd October, 2019 granted the Respondent an enforcement order for the possession of the land under title number Njewa 9/7; that the jurisdiction to grant possession for land is for High Court Judge not a Registrar"; and "that all these and the matters raised in the notice of appeal are matters that will become relevant for the Supreme Court when deliberating the appeal".

2. *Background*

2.1 In order to appreciate the basis of the Appellant's application herein, it is necessary to briefly outline the facts in this matter, in so far as they are relevant to this application.

2.1.2 The Respondent commenced proceedings in the court below on 2nd December, 2015, by way of *ex-parte* injunction to restrain the Appellant from selling a property title number Njewa 9/7 situated in Lilongwe, belonging to the Respondent. The property had apparently been charged to the Appellant by the Respondent as security for loan which the Appellant had made to Respondent t/a Dean Engineering Company Limited. In separate proceedings [Commercial Cause No. 167 of 2016] in the court below commenced by the Appellant against the Respondent and Dean Engineering Company Limited the Appellant sued for amounts outstanding in respect of the loan.

2.1.3 In relation to injunction to restrain the Appellant from selling the Respondent's property, the Appellant was apparently granted 14 days within which to file an affidavit in response and/or in opposition to the Respondent's application for the injunction, but the Appellant failed to do so. The court below on 19th June, 2018, accordingly, entered judgment in favour of the Respondent and, ordered that "*the charge that was registered to the [Appellant] over the [Respondent's] property title no [Njewa 9/7] ... be and is hereby set aside and the [Appellant] is ordered to give the {Respondent] possession of his property [title no. 9/7] within 14 days from the date of this order*".

2.1.4 In respect of the amounts claimed by the Appellant under the loan agreement in Commercial Cause No. 167 of 2016, the court below also ordered that "*the [Respondent] is hereby relieved of the obligation to pay the [Appellant] any further sums, be it in form of principal or interest in respect the loan or loans that were the subject matter of [the] proceedings*".

2.1.5 On 21st June, 2018, the Appellant filed an application to set aside the default judgment entered by the court below on 19th June, 2018. The Appellant's application was opposed by the Respondent. In its ruling delivered on 3rd September, 2018, the court below declined to set aside the judgment in default, and dismissed the Appellant's application.

2.1.6 The Appellant, being dissatisfied with the ruling of the court below, on 5th September, 2018, filed a notice of appeal. A copy of the notice of appeal, setting out the grounds of appeal and the relief sought from the Supreme Court of Appeal, is attached to the Appellant's application herein and is exhibited as "PGM5". The grounds of appeal stated in the notice of appeal are as follows-

"*3. Grounds of Appeal*

3.1 The Honourable Judge erred in law in refusing the appellant's application to set aside the judgment given ex-parte and to extend the time within which to file sworn statement in opposition to [the]Respondent's application to re-open [the] account and set aside [the] charge, when the period of default was not inordinate.

3.2 The Honourable Judge erred in law in discharging the charge that the appellant had over the Respondent's property Title Number Njewa 9/7 when the appellant had already exercised its power of sale as charge such that there was not charge to discharge.

3.3 The Honourable Judge erred in law in ordering the discharge of the charge when the Respondent's remedies under law lie in damages.

3.4 The Honourable Judge erred in law in delving into substantive matters of the case without affording the parties the right to be heard.

3.5 The Honourable Judge erred in law in delving into matters that were not raised by the Respondent in his application without affording the parties to be heard on the same.

3.6 The decision of the Judge in all the circumstances of the case was grossly against the weight of the evidence.

3.7 All in all, the errors of the Honourable Judge have caused injustice to the Appellant.

4. Relief sought from the Court

4.1 A reversal of the ruling of court below with costs of this appeal and the court below.

4.2 The Honourable Supreme Court should also set aside the judgment entered for the Respondent on 19th June, 2018' allow the Appellant's sworn statement in opposition to the Respondent's application to re-open [the] account, and rehear the matter.".

3. *Respondent's notice of preliminary objection to the Appellant's application herein and cross application to strike out the notice of appeal*

3.1 On 24th October, 2019, the Respondent filed a notice of preliminary objection to the Appellant's application herein and cross application to strike out the notice of appeal

3.2 During the hearing of this matter on 25th October, 2019, the Counsel for the Appellant proposed that the Appellant's application herein be argued first, and that the Respondent's preliminary objection to the Appellant's application herein, and well as the cross application to strike out the notice of appeal, be dealt with by Counsel for the Respondent as part of the Respondent's response to the Appellant's application herein. Counsel for the Appellant stated

that the Appellant's application herein was urgent, and had been prompted by enforcement proceedings in the court below, and the Appellant's concerns need to be addressed urgently. However, Counsel for the Respondent was of a different view and argued and submitted that the Respondent's preliminary objection and cross application to strike out the notice of appeal should be heard and disposed of first, principally because the Respondent had not been served with Appellant's skeleton arguments relating to the Appellant's application herein nor supplementary affidavit relating to its application herein which was filed on 23rd October, 2019, and Counsel for the Respondent had not, therefore, prepared and filed any skeleton arguments in response; that the order and/or ruling of the court below sought to be stayed are dated 19th June, 2018 and 3rd September, 2018, respectively, and there is, therefore, no urgency in this matter. Counsel for the Respondent, therefore, urged this Court to proceed with the hearing of the preliminary objection and cross application to strike out the notice of appeal.

3.2.1 This Court noted that the Appellant had not filed any response to the Respondent's preliminary objection and cross application to strike out the notice of appeal, and inquired from Counsel for the Appellant whether he was prepared to respond the Respondent's application; and with the agreement of Counsel for the Appellant, this Court proceeded to hear the Respondent's preliminary objection and cross application to strike out the notice of appeal.

3.3 The Respondent's notice of preliminary objection and cross application to strike out the notice of appeal is stated to be filed "*under Part 52.18 of the Civil Procedure Rules*", and is in the following form-

> "*TAKE NOTICE that immediately before the hearing of the Appellant's application for stay of execution, the Respondent shall raise a preliminary objection to dismiss the said application for:*
>
> *(a) being premature, and*
>
> *(b) not supported by the law it cites.*
>
> *(c) there being no skeleton arguments filed in its support within the prescribed days.*
>
> *And at the same the Respondent shall apply to the Court to strike out the Notice of Appeal, the same having never been served on the Respondent as is required by law.*
>
> ***TAKE FURTHER NOTICE** that the Affidavit of Wapona Kita of Counsel and the skeleton arguments shall be read in support of the above preliminary objection and cross application*".

3.4 In the notice of preliminary objection the Respondent objects to hearing of the Appellant's application herein on the grounds that the application was "was premature"; that the application is "not supported by the law it cites" and that there are "no skeleton arguments filed in its support within the prescribed days". The Respondent also contends that the notice of appeal filed on 5th September, 2018 was never served on the Respondent as is required by law, and the respondent puts the Appellant on guard that he will apply to the Court to strike out the notice of appeal. The notice of preliminary objection and cross application to strike out the notice of appeal is supported by an affidavit of Counsel Kita and as well as skeleton arguments.

The Respondent's arguments and submissions

3.5 During the hearing of this matter, on 25th October, 2019, the Respondent adopted the both the affidavit and the skeleton arguments that had been on 24th October, 2019 in support of the preliminary objection and the cross application to strike out the notice of appeal. The arguments and submissions of the Respondent are premised on the following paragraphs of the supporting affidavit of Counsel Kita-

> "*3. **THAT** this affidavit is solely in support of the preliminary objection being raised by the Respondent as well as in support his application to strike out the notice of appeal but does not touch on the merits on the Appellant's application for stay. Should it please the Court to dismiss the application based on the preliminary objection and/or strike out the notice of appeal, then there will be no need to respond to the Appellant's application for stay. However, should the court in the unlikely event order otherwise, then the Respondent reserves its right to oppose to the application for stay on the merits.*
>
> *4. **THAT** with regards to the grounds for the preliminary objection, these are grounded on points of law and have been fully advanced in the Skeleton Arguments.*
>
> *5. **THAT** with regard to striking out the Notice of Appeal, the Respondent avers that it has never been served with any Notice of Appeal in the within matter contrary to the requirements of the law.*
>
> *6. **THAT** Exhibit PGM 5, the purported Notice of Appeal shows that it was filed in the lower court on the 6th of April, 2018, meaning that as at now, more than a year has elapsed without the Appellant causing the said Notice of Appeal to be served on the Respondent let alone prosecuting its appeal.*
>
> *7. **THAT** Notice of Appeal being the only document which gives the Appellant the basis to approach this Court, and the same having never been brought to the attention of the Respondent who is meant to defend himself against it, it be accordingly set aside as the period for serving it on the Respondent expired way back and there has been no extension granted by any court to serve it out of time. It is therefore a null and void Notice of Appeal which must be struck out.*
>
> ***WHEREFORE,** I humbly pray to the Honourable Court to dismiss the application for stay based on the grounds raised in the preliminary objection and to strike out the Notice of Appeal for it being no notice of appeal any more with costs*".

3.6 By way of general argument and submission the Respondent submits that the Appellant' application herein was filed in this Court on the 16th of October, 2019; that the date 16th of October, 2019 is important because the filing of the application before this Court on this date was premature; that the Appellant's application herein is stated to be brought under Order I, rule 18 of Supreme Court of Appeal Rules and Part 52.7 of the Civil Procedure Rules as read with section 7 of the Supreme Court of Appeal Act, and that the citation of these legal provision

is important because none of these provisions permit the Appellant's application herein; and that Exhibit PGM 5 shows that the Appellant purportedly filed a notice of appeal on 5th September, 2018, but the exhibit does not show that the notice was served on the Respondent at all.

3.7 The gist of the Respondent's arguments and submissions as set out in the skeleton arguments is as follows-

The application for stay is premature

3.7.1 The Respondent contends that the Appellant's application herein is premature and, on this basis alone, must be dismissed. In this regard the Respondent argues and submits that the settled legal position is that when applying for stay in this Court, an applicant must ensure that at the time of making the application, there is an immediately enforceable judgment against which the application for a stay is made. The Respondent contends that this legal position is well enunciated in the recent decision of this Court in *Premium Tama v F Mambala and Others* Civil Appeal No: 72 of 2016 in which Chikopa, JA, delivering the unanimous Ruling of this Court, stated as follows-

> *"The Respondents brought this matter against the Appellants in the Industrial Relations Court (IRC) claiming damages for unfair termination and breach of employment contract. The IRC found for them with damages to be assessed. Before the same were assessed, the Appellants appealed to the High Court where the appeal was dismissed with damages to be assessed by the Registrar. Before he could, the Appellants approached this court by way of appeal but only with respect to liability.*
>
> *With respect, we think this appeal is prematurely before us. For as long as the damages have not been quantified, the judgment against the Appellants remains inchoate, incapable of enforcement. On the other hand, it opens the doors to the real possibility for multiple appeals with parties being at liberty to appeal up to this court not only in respect of liability but also on the quantum of damages. As experience has shown, it, works out an injustice with successful litigants being kept away from the fruits of a successful litigation for up to six years or more. See: FMB v Eisenhower Mkaka & Others [MSCA Civil Appeal Cause Number 19 of 2017, Being High Court of Malawi Lilongwe Registry Civil Cause Number 25 of 2009].*
>
> *It, in keeping with similar sentiments expressed in AON v Makolo MSCA Civil Appeal No. 22 of 2018] and Toyota Malawi Limited vs. Jacques Mariette [MSCA Civil Appeal Cause Number 61 of 2017], seems to us the proper thing to do that parties should only appeal where the Court below has dealt with issues of both liability and damages to finality. Where there is an immediately enforceable judgment which is not the case herein.*
>
> *Accordingly, it is our conclusion that the appeal is prematurely before us. The appeal is hereby delisted. Costs shall be the cause.".*

3.7.2 The Respondent refers to paragraph 15 of the affidavit of Counsel Mpaka filed in support of the Appellant's application herein, which states that "... *meanwhile, the Claimant*

in the process of trying to enforce the default judgment in PGM 4 above following the Ruling of 3rd September, 2018. In this regard, an application was taken before the Registrar of the Court below and heard on the 18th of September, 2019 and is pending Ruling", and the Respondent argues and submits that the Appellant concedes that at the time of filing of its application herein, there was no order or judgment capable of enforcement, but rather that the Respondent had made an *inter- partes* application for an enforcement order and that, at the time of the filing of the application herein, the matter was still before the court below, and the parties were awaiting its Ruling.

3.7.3 The Respondent argues and submits that from the Appellant's own evidence it is clear that at the time of filing of the application herein in this Court, the court below had not yet finally dealt with the *inter-partes* application for an enforcement order, and the application of the enforcement was still pending the court below. The Respondent further argues and submits that the default judgment of the court below dated 19th June, 2018 and the ruling of the court below dated 3rd September, 2018 are not enforceable *per se*, but require an enforcement order for the possession of land obtainable under Order 28, rule 37 of the Courts (High Court) (Civil Procedure) Rules (Cap. 3:02 *sub. leg.* p. 124); that at the time of filing the Appellant's application herein in this Court, such an enforcement order had not yet been obtained; that it is clear from Order 28, rule 48 of the Rules which provides that "an enforcement respondent may apply to the court for an order suspending the enforcement of an order"; that it is only the enforcement order for possession of land which can be stayed; and that there having be no enforcement order on the 16th of October, 2019, the date on which the Appellant filed its application herein in this Court, the application herein is premature.

3.7.4 The Respondent acknowledges that on 22nd October, 2019 the facts changed. The ruling referred to in paragraph 15 of the affidavit of Counsel Mpaka that the parties were waiting for has now been delivered, and the Assistant Registrar in the court below had granted the Respondent its application for an enforcement order for possession of land, being Title No: 9/7 in the City of Lilongwe. However, the Respondent contends that this Court cannot proceed to entertain the Appellant's application herein because it was filed when there was no enforceable order to stay and, as I understand the argument, that the application herein is itself premised on a default judgment dated 19th June, 2018, and a ruling dated 3rd September, 2018, which are not *per se* enforceable or, in any event, are not enforceable without an appropriate enforcement order.

3.8 With respect to court in which application should first have been made the Respondent cites Order I, rule 18 of 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*".

3.8.1 The Respondent argues and submits that, in accordance with Order 28, rule 48 of Courts (High Court) (Civil Procedure) Rules an enforcement respondent is entitled to make an application for suspension of the enforcement order in the court below, and in this case the Appellant is obliged, in accordance with Order I, rule 18 of Supreme Court of Appeal Rules to make an application first in the court below before coming to this Court; that the jurisdiction of this Court to entertain an application for stay only comes into being after the court below has refused such application; that in the matter, the Appellant has not attempted at all to make an application the court below to stay the enforcement of the order of possession of the 22nd of October, 2019; and that on that basis, therefore, this Court has no jurisdiction to entertain the

Appellant's application herein before it because the said application has not been filed in the first place in the court below and rejected. In this regard the Respondent cites the case of *Lackson Chimangeni Khamalatha & 26 Others v The Secretary General of the Malawi Congress Party and Others* MSCA No: 67 of 2016 in which, on the same basis, my esteemed brother, Chipeta, JA, in dismissing an application for stay which had been brought before him in exactly the same manner, stated as follows-

> *"It follows, as I apprehend, that even if this Summons was seeking an intermediary relief other than the main prize of the appeal, and even if I had the power to consider granting them that relief pending appeal, I would still have found that the applicants/Appellants have brought me their interlocutory application before my time is ripe to start hearing such applications pending their appeal. In this instance, therefore, I find that I do not have the jurisdiction to handle this Summons, which has been brought prematurely to me."*

3.8.2 The Respondent, accordingly, submits that this Court does not have the jurisdiction to entertain the Appellant's application herein when the same has not been applied for and refused in the court below, in the first place; and that on this basis alone, this Court ought to dismiss the Appellant's application herein *ex debito justiciae* with costs.

The application is not supported by the law cited

3.9 The Respondent refers to the fact that the Appellant cites three provisions as the basis of making its application before this Court, namely, Order I, rule 18 of the Supreme Court of Appeal Rules, Part 52.7 of the Civil Procedure Rules and section 7 of the Supreme Court of Appeal Act. The Respondent contends that none of these provisions afford Appellant the right to make the application herein.

3.9.1 With respect to 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*" the Respondent argues and submits that this Order cannot be used as a basis for the Appellant to lodge its application herein in this Court. The Respondent contends that, even if the Appellant were to be entitled to apply for a stay of default judgment of the court below dated 19th June, 2018 and the ruling of the court below dated 3rd September, 2018, neither of which is enforceable *per se*, the Appellant would still be required to show that an appropriate application for stay had been made in the court below and it has been declined. The Respondent further contends that 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 herein under a rule or provision which provides that one may apply for stay in this Court. The Respondent further reiterates the fact that the Appellant has not first applied for any stay in the court below to stop the enforcement of the enforcement order dated 22nd October, 2019; and that the invocation of Order I, Rule 18 of the Supreme Court of Appeal Rules does not help the Appellant either way and cannot be used as a basis for making the application herein in this Court.

3.9.2 With respect to Part 52.7 of the Civil Procedure Rules referred to in the Appellant's application herein, as the basis for making its application, the Respondent contends that the Civil Procedure Rules of England, have been subject to a numerous amendments since this Court started using the Rules; that the provision dealing with applications for stay is no longer Part 52.7; that the current Part 52.7 deals with permission to appeal and not to apply for stay, and that the Part that deals with stay is 52.16, and in this regard the Appellant refers to the official website of the England Government website www.justice.gov.uk/courts/procedure-rules/civil/rules/part52/. The Respondent argues and submits that the Appellant has cited a wrong provision as the basis for the making of the application herein; and the application must, accordingly, be dismissed.

3.9.3 The Respondent further contends that the Appellant's application herein cannot be made under section 7 of the Supreme Court of Appeal Act as indicated in the application because this section merely gives general jurisdiction to the single member of this Court to hear applications that do not dispose of the appeal; that an applicant must always point to some law that affords the right to apply to this Court for a stay; and that in case the Appellant has failed to do so, and the application herein, therefore, has got no basis in law and must be dismissed accordingly.

Skeleton arguments in support of application for stay

3.9.4 The Respondent cites clause 1 (b) (i) of Practice Direction No. 1 of 2010 which provides as follows-

> "*When presenting skeleton arguments in the Malawi Supreme Court of Appeal-with regard to interim orders and related matters:*
>
> *The applicant shall file skeleton arguments with the Court within seven (7) days from the date of filing the application and, except in the case of ex parte applications, shall during the same period serve a copy of the skeleton arguments on the respondent*",

and argues and submits that clause 1 (b) (i) of Practice Direction No. 1 of 2010 makes it mandatory for the parties to file skeleton arguments in all their applications before the Supreme Court of Appeal. The Respondent contends that in this matter the Appellant has not served on the Respondent any skeleton arguments in support of the Appellant's application herein;, and further contends that the consequences of failure to file and serve skeleton arguments are contained in Clause 1 (b) (iii) of the Practice Direction No: 1 of 2010 which provides that "*if the Applicant fails to comply with subgraph (b) (i) of this paragraph, the application shall not be set down for hearing and at the court's instance be dismissed*".

3.9.4.1 The Respondent argues and submits that case authorities are abound in which this Court has dismissed applications by parties who failed to file and serve skeleton arguments in line with the Practice Direction No. 1 of 2010; that the case before this Court is no different; that the rules are clear; and the Appellant's application herein deserves to be dismissed on this ground.

Service of notice of appeal

3.10 The Respondent contends that although the Appellant filed its notice of appeal on the 5th of September, 2018, the notice of appeal has never been served on the Respondent at all. The Respondent further contends that, although neither the Supreme Court of Appeal Act nor the Supreme Court of Appeal Rules prescribes the time within which a notice appeal must be served, but that this is prescribed in Part 52.12 (3) (b) of Civil Procedure Rules, which is applicable in this Court, and provides as follows-

> *"(3) Subject to paragraph (4) and unless the appeal court orders otherwise, an appellant's notice must be served on each respondent—*
>
> *(a) as soon as practicable; and*
>
> *(b) in any event not later than 7 days after it is filed.*
>
> *(4) Where an appellant seeks permission to appeal against a decision to refuse to grant an interim injunction under section 41 of the Policing and Crime Act 2009, the appellant is not required to serve the appellant's notice on the respondent.*

3.10.1 The Respondent argues and submits that the notice of appeal filed on 5th September, 2018 is not a notice of appeal at all because it cannot now be legally served on the Respondent because the time for its service expired and there is no court order granting its extension of service; that as matters stand, there is no appeal to reach to this Court because the record of appeal itself cannot be prepared without validly serving the notice of appeal on the Respondent. The Respondent contends that the Appellant only wants to use the notice of appeal to obtain the stay of execution; that the inordinate and inexcusable delay of failure to serve the notice of appeal for more than a year cannot be entertained by any court that has the principle of bringing litigation to an end in mind.

3.10.2 The Respondent further argues and submits that the failure to serve a notice of appeal on him within 7 days after its filing, and up until now at more than a year, as required by Part 52.12 (3) (b) of Civil Procedure Rules, is a compelling reason for this Court to strike out the notice of appeal; and in this regard the Respondent cites Part 52.18 of Civil Procedure Rules, which provides as follows, gives this Court powers to strike out a notice of appeal-

> *"(1) The appeal court may—*
>
> *(a) strike out the whole or part of an appeal notice;*
>
> *(b) set aside permission to appeal in whole or in part;*
>
> *(c) impose or vary conditions upon which an appeal may be brought.*
>
> *(2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so.".*

3.10.3 In another breathe the Respondent argues and submits that the Notice of Appeal is void ab initio as it stands since it cannot be used to take any steps towards the prosecution of the appeal itself.

3.10.4 The Respondent, accordingly, prays that this Court should exercise its discretion to strike out the notice of appeal for the reasons given above.

3.11 The Respondent, accordingly, prays that this Court should allow the preliminary objection raised and proceed to dismiss the application for stay, and also strike out the notice of appeal.

4. *The Appellant's arguments and submissions in opposition*

4.1 During the hearing of this application on 25th October, 2019, the Appellant opposed both the Respondent's application both in relation preliminary objection and the cross application to strike out the notice of appeal. The gist of the Appellant's arguments and submissions are as follows-

The application for stay is premature

4.1.1 With respect to the Respondent's argument and submission that the Appellant's application herein is premature and that, on this basis alone, must be dismissed, the Appellant argues and submits that it is appropriate for the Appellant to apply for a stay as it has, and that it is not necessary that there should have been in effect an enforcement order in relation to the repossession of the property title no. Njewa 9/7 before the Appellant apply for a stay in this matter; and that the application herein for a stay was not premature, as contended by the Respondent, or at all. With respect to appropriate court in which, in accordance with Order I, rule 18 of the Supreme Court of Appeal Rules, its application herein should be made, the Appellant refers to paragraph 14 of the affidavit of Counsel Mpaka, and contends that on 6th September, 2018 the Appellant made an application in the court below for an order of stay, pending the hearing and determination of the appeal herein, but the court below refused to grant the application. The Appellant thus contends that a similar application had been made in the court below and was rejected; and the application now before this Court has been properly brought in accordance with Order I, rule 18 of the Supreme Court of Appeal Rules.

Skeleton arguments in support of application for stay

4.1.2 With respect to the Respondent's contention that the Appellant has not served skeleton arguments on the Respondent as required by Clause 1 (b) (i) of Practice Direction No. 1 of 2010, the Appellant contends that the skeleton arguments were dispatched to the Respondent by courier 23rd October, 2019, and that this was within the seven days prescribed. The Appellant, nevertheless, did not dispute the fact that there is no return of service on the court file, nor did the Appellant dispute the fact that the skeleton arguments were not actually received by the Respondent before the date of the hearing of the application herein and, therefore, were not duly served on the Respondent.

Service of notice of appeal

4.1.3 With respect to the Respondent's contention that the notice of appeal filed on 5th September, 2018 has never been served on the Respondent at all; that the notice of appeal is a

no notice of appeal because as it is, it cannot be legally served on the Respondent since the time for its service expired way back and there is no order of the court granting its extension; that as things stand, there is no appeal to reach to this Court since the record of appeal itself cannot be prepared without validly serving the notice of appeal on the Respondent; that the Appellant only wants to use the notice of appeal to obtain the stay of execution; that the inordinate and inexcusable delay of failure to serve the notice of appeal for more than a year cannot be entertained by any court that has the principle of bringing litigation to an end in mind, the Appellant argues and submits that, in accordance with Order III, rule 2 of the Supreme Court of appeal Rules, a valid notice of appeal was filed by the Appellant on 16th September, 2018; that, in accordance with Order III rule 5 (1) of the Rules, it is the responsibility of the Registrar of the court to serve the notice of appeal on the Respondent; that the non-compliance relating the service of the notice of appeal does not detract from the validity of the notice of appeal; and that the Appellant should not be punished for the fact that the notice of appeal was not served on the Respondent. The Appellant, accordingly, argues and submits that the notice of appeal should not be struck out.

5. *Determination*

5.1 This Court has carefully considered and reflected on the lucid arguments and submissions of Counsel for and in opposition to the Respondent's preliminary objection to the Appellant's application herein, and also, the cross application to strike out the notice of appeal, and wish to express its gratitude to both Counsel for their industry. This Court notes that although the matter before me relates specifically to a preliminary objection with the respect to the Appellant's application herein, some of the issues raised in the arguments and submissions of the parties go beyond the Appellant's application herein and raise the issue whether there is a valid appeal lodged by the Appellant. In this regard, this Court has reminded itself 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 on 5th September, 2018. Thus, and without in any way wishing to be understood or seen to be determining the appeal, this Court will consider and determine only the several pertinent issues that have arisen in the arguments and submissions in this matter, but will not consider and/or determine the merits of the appeal as set out in several grounds of appeal in the notice of appeal filed on 5th September, 2018.

Notices of preliminary objection

5.2 It is pertinent to observe that in this Court, notices of preliminary objection are required to be filed pursuant to Order III, rule 14 of the Supreme Court of Appeal Rules, not under Part 52.18 of the of the Civil Procedure Rules. The extent that the Supreme Court of Appeal Rules make express provision for the filing of notices of preliminary objection, the provisions of the Civil Procedure Rules relating to preliminary objections are not, in accordance with proviso (b) to section 8 of the Supreme Court of Appeal Act, applicable in this Court. The Respondent's application should have stated, as this Court understood the intention to be, that the notice of preliminary objection herein was filed under Order III, rule 14 of the Supreme Court of Appeal Rules, and the application to strike out the notice of appeal was filed under Part 52.18 of the Civil Procedure Rules. Furthermore, the Appellant does not appear to have been misled or prejudiced in any material respect by the anomaly, and was able to respond to the issues raised in the preliminary objection.

Whether the Appellant's application herein is premature or whether this Court has jurisdiction to hear the Appellant's application herein

5.3 The first most important issue that this Court has to determine is whether it has jurisdiction to entertain or hear the Appellant's application herein, and in that regard the issues raised in preliminary objection by the Respondent are relevant. If this Court has no jurisdiction to hear the Appellant's application herein some of the issues raised by the parties may not require determination because they would become *itiose*; but for the sake of properly considering all the arguments and submissions of the parties in their proper context, and to ensure that the parties understand and appreciate why some of their arguments and submissions have not influenced the determination of this Court, it is, nevertheless, appropriate that all the issues raised be considered and determined.

5.3.1 The most critical issue raised by Respondent in his preliminary objection, which has direct bearing on the question whether I have jurisdiction to hear the Appellant's application herein, is that the Appellant's application herein is premature because at the time that application herein was filed there was no immediately enforceable judgment against which the application for a stay could be made and, on this basis alone, the application herein must be dismissed and the Respondent correctly cites the unanimous decision of this Court in *Premium Tama v F Mambala and Others* Civil Appeal No: 72 of 2016. In this regard the Appellant, in paragraph 15 of the affidavit of Counsel Mpaka, concedes that at the time of filing of its application herein in this Court, there was no order or judgment capable of enforcement, but rather that the Respondent had made an *inter-partes* application for an enforcement order for possession of land, being Title No: 9/7 in the City of Lilongwe based on the default judgment of the court below dated 19th June, 2018 and the ruling of the court below dated 3rd September, 2018 and that, at the time of the filing of the application herein, the matter was still before the court below, and the parties were awaiting the ruling of the court below.

5.3.2 The Appellant's application herein is expressly premised on the default judgment of the court below dated 19th June, 2018 and the ruling of the court below dated 3rd September, 2018. However, neither the default judgment of the court below dated 19th June, 2018 nor the ruling of the court below dated 3rd September, 2018 are enforceable *per se*, but require an appropriate enforcement order for the possession of land obtainable under Order 28, rule 37 of the Courts (High Court) (Civil Procedure) Rules. The enforcement order for possession of land, being Title No: 9/7 in the City of Lilongwe was only granted on 22nd October, 2019, after not before the time of filing the Appellant's application herein in this Court. The Appellant's application herein thus relates to a default judgment and ruling that are not enforceable *per se*. The Appellant should have waited for the court below to deliver its ruling on the application for an enforcement order for possession of land, in relation to Title No: 9/7 in the City of Lilongwe before considering and filing an appropriate application, pursuant Order 28, rule 48 of the Courts (High Court) (Civil Procedure) Rules for an order suspending the enforcement order. If, after the enforcement order for possession of land, in relation to Title No: 9/7 in the City of Lilongwe was granted, the Appellant considered it necessary or appropriate to stay the enforcement order, the Appellant should have considered the requirement of Order I, rule 18 of the Supreme Court of Appeal Rules and filed an appropriate application for a stay in the court below; the Appellant should have approached this Court only if the application in the court below was declined or refused, and not before the any such application was dealt with in the court below.

5.3.3 This Court is, of course, aware that 14 of paragraph the affidavit of Counsel Mpaka states that "Following the ruling of 3rd September, 2018, the Defendant took out an appeal and moved the court below for an order of stay, pending appeal. On 6th September, 2018, the court below declined the application for stay pending appeal. I exhibit hereto marked as "PGM" a copy of the notice of appeal filed with the court". This Court has had the opportunity to peruse the case file of the court below and has found no evidence that 3rd September, 2018, the Appellant moved the court below for an order of stay, pending appeal, and that on 6th September, 2018, the court below declined the application for stay, as asserted by the Appellant. This Court is also aware that with respect to the Respondent's argument and submission that the Appellant's application herein is premature and that, on this basis alone, must be dismissed, the Appellant argues and submits that it is appropriate for the Appellant to apply for a stay as it has, and that it not necessary that there should have been in effect an enforcement order in relation to the repossession of the property title no. Njewa 9/7 before the Appellant apply for a stay in this matter; and that the application herein for a stay was not premature, as contended by the Respondent, or at all. However, this Court is of the firm view that, to the extent that they relate to the repossession of land, neither the default judgment of the court below dated 19th June, 2018, nor the ruling of the court below dated 3rd September, 2018, is enforceable *per se*; the default judgment and ruling only become enforceable on the granting of an enforcement order for possession of land, pursuant Order 28, rule 48 of the Courts (High Court) (Civil Procedure) Rules.

5.3.4 This Court, accordingly, sustains the Respondent arguments and submissions that this Court cannot proceed to entertain the Appellant's application herein because it was filed when there was no enforceable order to stay; that the Appellant's application herein itself is premised on a default judgment and order which are not *per se* enforceable or, in any event are not enforceable without an appropriate enforcement order; and that, to the extent that the enforcement order for possession of land herein was only granted on 22nd October, 2019, after not before the time of filing the Appellant's application herein in this Court, the Appellant should first apply for a stay or suspension of that order in the court below. If I may echo the sentiments of my esteemed brother Chipeta, JA, in *Lackson Chimangeni Khamalatha & 26 Others v The Secretary General of the Malawi Congress Party and Others* (supra) –

> "*It follows, as I apprehend, that even if this Summons was seeking an intermediary relief other than the main prize of the appeal, and even if I had the power to consider granting them that relief pending appeal, I would still have found that the applicants/Appellants have brought me their interlocutory application before my time is ripe to start hearing such applications pending their appeal. In this instance, therefore, I find that I do not have the jurisdiction to handle this Summons, which has been brought prematurely to me.*"

5.3.5 This Court is, therefore, inclined to dismiss the Appellant' application herein AND IT IS SO ORDERED.

Order I rule 18 of the Supreme Court of Appeal Rules, Part 52.7 of the Civil Procedure Rules and section 7 of the Supreme Court of Appeal Act

5.4 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 I 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. 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 the Respondent because the Respondent does not appear to have been misled or prejudiced in any material respect, and the anomaly is easily rectifiable.

Appellant's application herein was wrongly made pursuant to Part 52.7 of the Civil Procedure Rules

5.4.1 With respect to Part 52.7 of the Civil Procedure Rules referred to in the Appellant's application herein, as the basis for making its application, the Respondent contends that the provision dealing with applications for stay is no longer Part 52.7; that the current Part 52.7 deals with permission to appeal and not to apply for stay, and that the Part that deals with stay is 52.16, and in this regard the Appellant refers to the official website of the England Government website www.justice.gov.uk/courts/procedure-rules/civil/rules/part52/. The Respondent argues and submits that the Appellant has cited a wrong provision as the basis for the making of the application herein; and the application must be dismissed accordingly. 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 the Respondent because the Respondent does not appear to have been misled or prejudiced in any material respect, and the anomaly is easily rectifiable.

The Appellant's application herein was wrongly made pursuant to section 7 of the Supreme Court of Appeal

5.4.2 This Court sustains the Respondent's preliminary objection that the Appellant's application herein should not have made under section 7 of the Supreme Court of Appeal Act as indicated in the application because that this section merely gives general jurisdiction to the single member of this Court to hear applications that do not dispose of the appeal. This Court is, nevertheless, also not inclined to dismiss the Appellant's application herein on the basis of this anomaly correctly identified by the Respondent because the Respondent does not appear to have been misled or prejudiced in any material respect, and the anomaly is easily rectifiable.

Skeleton arguments in support of application for stay

5.5 The Respondent cites clause 1 (b) (i) of Practice Direction No. 1 of 2010 which provides as follows-

> "*When presenting skeleton arguments in the Malawi Supreme Court of Appeal-with regard to interim orders and related matters:*
>
> *The applicant shall file skeleton arguments with the Court within seven (7) days from the date of filing the application and, except in the case of ex parte applications, shall during the same period serve a copy of the skeleton arguments on the respondent*",

and the Respondent argues and submits that clause 1 (b) (i) of Practice Direction No. 1 of 2010 makes it mandatory for the parties to file skeleton arguments in all their applications before the Supreme Court of appeal. The Respondent further contends that in this matter the Appellant has not filed and served on the Respondent any skeleton arguments in support of the Appellant's application herein. The Respondent further argues and submits that the consequences of failure to file and serve skeleton arguments are contained in Clause 1 (b) (iii) of the Practice Direction No: 1 of 2010 which provides that **"***if the applicant fails to comply with subgraph (b) (i) of this paragraph, the application shall not be set down for hearing and at the court's instance be dismissed***".**

5.5.1 The Respondent argues and submits that case authorities are abound in which this Court has dismissed applications by parties who failed to file and serve skeleton arguments in line with the Practice Direction No. 1 of 2010; that the case before this Court is no different; that the rules are clear; and the Appellant's application herein deserves to be dismissed on this ground. However, the Appellant contends that its skeleton arguments were dispatched to the Respondent by courier 23rd October, 2019, and that this was within the seven days prescribed. The Appellant, nevertheless, did not dispute the fact that there is no return of service on the court file, nor did the Appellant dispute the fact that the skeleton arguments were not actually received by the Respondent before the date of the hearing of the application herein and, therefore, were not duly served on the Respondent.

5.5.2 This Court is extremely concerned with the seeming growing common practice among some members of the bar of ambushing each other, and sometimes even ambushing the court, filing skeleton arguments in court late, and by serving skeleton arguments on each other at the last minute. This practice deprives both the court and counsel to properly consider skeleton arguments in advance, and more often than not inevitably leads to avoidable adjournments. In this regard, this Court is not impressed with the explanation provided by the Appellant for not ensuring that the Respondent is served with its skeleton arguments in good time. The explanation, on behalf of the Appellant, that the skeleton arguments were dispatched to the Respondent by courier on 23rd October, 2019 and that this was within the 7 day period prescribed by Practice Direction No. 1 of 2010, does not make sense at all having regard to the fact that, in its application herein the Appellant had expressed a desire that this matter be considered urgently, and when the Appellant must have known that this Court had acceded to the request to urgently consider matter and had for purpose set down this matter for hearing on 25th October, 2019. The fact that Practice Direction No. 1 of 2010 requires that skeleton arguments should be served within 7 days of the filing of an application or process does not mean that the skeleton arguments should be served close to the expiry of the 7 day period prescribed in the Practice Direction No. 1 of 2010, especially in case like this in which the Appellant attached some urgency to hearing and determination of its application. If the Appellant, indeed attached any urgency to the hearing of its application, the skeleton arguments should have been filed together with the application. Alternatively, having opted to initially file only the application, the Appellant could have expedited service of the skeleton argument by using electronic means; for instance, by sending an advance copy of the skeleton arguments to the Respondent through e-mail or other electronic means – after all we are living in the 21st century!!! That way the Respondent would have had the opportunity to consider the Appellant's skeleton arguments and prepare his own skeleton arguments in response. This Court, therefore, finds it most regrettable that the Appellant has come to this Court to prosecute an application, an apparent application, without cogent evidence that the respondent was duly served with skeleton argument relating to the Appellant's application herein, or a plausible explanation why the Respondent was not served with the skeleton arguments in good time before the date set

down for the hearing of the application herein. In this regard, the Court is of the firm view that in this matter the failure by the Appellant to serve skeleton arguments on the Respondent without a plausible explanation is most certainly a compelling reason to strike out the Appellant's application herein.

Whether the notice of appeal should be struck out

5.6 The Appellant's application herein is anchored on the hearing and determination of the appeal filed on 5th September, 2018. The Respondent contends that, although the Appellant filed its notice of appeal on the 5th of September, 2018, the notice of appeal has never been served on the Respondent at all; that, although neither the Supreme Court of Appeal Act nor the Supreme Court of Appeal Rules prescribes the time within which a notice appeal must be served, this is prescribed in Part 52.12 (3) (b) of Civil Procedure Rules, which are applicable in this Court, and provides an appellant's notice must be served on each respondent as soon as practicable and, in any event, not later than 7 days after it is filed. The Respondent argues and submits that the notice of appeal filed on 5th September, 2018 is void ab initio as it stands because it cannot be used to take any steps towards the prosecution of the appeal itself; that the notice of appeal is not a notice of appeal at all because it cannot now be legally served on the Respondent because the time for its service expired and there is no court order of granting extension for its service; that as matters stand, there is no appeal to reach to this Court because the record of appeal itself cannot be prepared without validly serving the notice of appeal on the Respondent. The Respondent contends that the Appellant only wants to use the notice of appeal to obtain the stay of execution; that the inordinate and inexcusable delay of failure to serve the notice of appeal for more than a year cannot be entertained by any court that has the principle of bringing litigation to an end in mind. The Respondent further argues and submits that because of the failure to serve a notice of appeal on him within 7 days after its filing, and up until now at more than a year, as required by Part 52.12 (3) (b) of Civil Procedure Rules, is a compelling reason for this Court to strike out the notice of appeal; and in this regard the Respondent cites Part 52.18 of Civil Procedure Rules which provides as follows- gives this Court powers to strike out a notice of appeal. The Respondent, accordingly, prays that this Court should exercise its discretion to strike out the notice of appeal for the reasons given.

5.6.1 The Appellant, on the other hand argues and submits that, in accordance with Order III, rule 2 of the Supreme Court of Appeal Rules, a valid notice of appeal was filed by the Appellant on 5th September, 2018; that, in accordance with Order III, rule 5 (1) of the Rules, it is the responsibility of the Registrar of the court to serve the notice of appeal on the Respondent; that the non-compliance relating the service of the notice of appeal does not detract from the validity of the notice of appeal; and that the Appellant should not be punished for the fact that the notice of appeal was not served on the Respondent. The Appellant, accordingly, argues and submits that the notice of appeal should not be struck out.

5.6.2 It is pertinent to observe that, although neither the Supreme Court of Appeal Act nor the Supreme Court of Appeal Rules provide for the time within which a notice appeal must be served, section 46 of the General Interpretation Act provides that "*where no time is prescribed or allowed within which anything shall be done, such thing shall be done without undue delay, and as often as due occasion arises*". To the extent that it in effect requires that a notice of appeal must be served on a respondent "without undue delay", section 46 of the General Interpretation Act, although not identical to, is very much consistent with the requirements of Part 52.12 (3) (b) of Civil Procedure Rules, which provides an appellant's notice must be served

on each respondent as soon as practicable, and in any event not later than 7 days after it is filed. Accordingly, in this matter the Registrar was required to serve the notice of appeal on the Respondent without undue delay or, in other words, as soon as practical.

5.6.3 It is also pertinent to stress that although, in accordance with Order III, rule 5 (1) of the Supreme Court of Appeal Rules, it is primarily the responsibility of the Registrar of the court to serve the notice of appeal on the Respondent, like all court processes, the Registrar must be moved to ensure that a notice of appeal is served on a respondent and, in this regard, there is no indication whatsoever that the Appellant at any time did so. This Court does not understand the legal position to be that an appellant who has filed a notice of appeal can, on the basis of Order III, rule 5 (1), sit back and not follow up on whether his notice of appeal has been served on a respondent. If an appellant is genuinely interested in prosecution his appeal, and prosecuting his appeal expeditiously, he will no doubt want to ensure that his notice of appeal has been served on the respondent, and also follow up on the other court processes that will ensure that the appeal is heard and determined expeditiously. In this regard this Court is not impressed with the explanation given by the Appellant on why the notice of appeal was not served on the Respondent. There is no indication that the Appellant followed up with the Registrar whether the notice of appeal had been served on the Appellant, and if not served why; there is also no indication that the Appellant even followed up on the status of the appeal, including the settlement of the record of appeal which the Appellant should have initiated; if the Appellant had done so he would have discovered that the notice of appeal had in fact not been served on the Respondent. It seems that the Appellant completely forgot about the notice of appeal which was filed on 5th September, 2018. Indeed, there is no indication, that having filed the notice of appeal on 5th September, 2018, the Appellant, in accordance with the requirements of Practice Direction No 1 of 2010, filed skeleton arguments in relation to the grounds of appeal set out in the notice; if he had done so, the Appellant would have discovered that the notice of appeal had not been served on the Respondent. The undisputed facts in this matter strongly establish that the Appellant did nothing whatsoever to follow up on his appeal, after the filing of the notice of appeal. In this regard, this Court is of the firm view that, with respect to failure or omission to serve the notice of appeal on the Respondent, the Appellant cannot shift the responsibility and blame to the Registrar; it is his appeal, and it is his notice of appeal. The Appellant had duty, consistent with the overriding objective of enabling this Court to deal with this matter justly, by ensuring that both parties to the proceedings herein are on an equal footing as required under the Civil Procedure Rules, at the very least, to follow up on his appeal and to bring to the attention of the Registrar the fact that the notice of appeal had not been served on the Respondent.

5.6.4 In considering whether or not to grant the Respondent's application to strike out the Appellant's notice of appeal filed on 5th September, 2018 this Court has considered the guidance provided by a number of case authorities as summarized in *Suleman v Suleman* MSCA Civil Appeal 64 of 2018 as follows-

> *"3.10 In summary, the relevant case authorities provide the following guidance: Firstly, while it is generally accepted that the court has unqualified discretion to strike out a claim or proceedings where a party has failed to comply with a time limit fixed by a rule, practice direction or court order, there are no hard and fast rules, and the court has to make a broad judgment having regard to all relevant circumstances and the justice of the case. The relevant circumstances may include the length of, explanation and responsibility for, the delay; whether the other party has suffered prejudice as a result and, if so, how*

the prejudice can be compensated for, and whether the delay is such that it is no longer possible to have a fair trial. The relevant circumstances may also include the weakness of the claim even if it is not so weak as to have no real prospects. Secondly, in considering what is the just and proportionate order to make where a party has failed to comply with a time limit fixed by a rule, practice direction or court order, the court must be mindful that the right to a fair trial is a right enjoyed by defendants as well as claimants", and must, therefore, have regard to and consider the alternative sanctions to that of striking out an action or proceedings. Where a delay occasions prejudice short of an inability of the court to be able to provide fair trial, there certainly would be or may be scope for the use of other forms of sanction rather striking out an action or proceedings. Where the conclusion that is reached is that the prejudice has resulted in an inability of the court to deal fairly with the case, there can only be one answer and one sanction; that is for the action or proceedings to be struck out. Thirdly, delay, even a long delay, cannot by itself be categorized as an abuse of process without there being some additional factor which transforms the delay into an abuse. Inordinate and inexcusable delay alone does not amount to abuse of process. However, it may do so if it involves a wholesale disregard for the rules of court with full awareness of the consequences. Furthermore, to commence or to continue proceedings with no intention to bring the proceedings a conclusion may constitute an abuse of process.".

5.6.5 In considering and determining what would be an appropriate order to make in relation to the failure or omission to serve the notice of appeal on the Respondent, this Court has carefully considered the Respondent's arguments submissions regarding the status of the notice of appeal, particularly the fact that, because the notice of appeal was not served without undue delay, or as soon as practicable after being filed, and that "the notice of appeal cannot be now legally served on the Respondent because the time for its service expired and there is no court order granting extension for its service; and that as matters stand, no record of appeal can be prepared without validly serving the notice of appeal on the Respondent. This Court has also considered the fact that, in its considered view, the fault for not serving the notice of appeal on the Respondent lays squarely with the Appellant, and the Appellant should not be allowed to benefit from its own ineptitude. In this regard, this Court is of the firm view that it would be unconscionable, and wrong in principle, to even consider allowing the Appellant to "regularize" the notice of appeal, which cannot now be served on the Respondent, by applying to extend the date of its service, because the Appellant is itself responsible for the fact that the notice of appeal cannot now be served on the Respondent and, in relation thereto, the Appellant has proffered no plausible or satisfactory explanation.

5.6.6 Furthermore, and perhaps more important, the Respondent was granted access to his property by the court below on two separate occasions. On 19th June, 2018, the court below entered judgment in favour of the Respondent and expressly ordered that "*the charge that was registered to the [Appellant] over the [Respondent's] property title no [Njewa 9/7] ... is ... set aside and the [Appellant] is ordered to give the [Respondent] possession of his property [title no. 9/7] within 14 days from the date of this order*" because the Appellant was apparently granted 14 days within which to file an affidavit in response and/or in opposition to the Respondent's application for the injunction, but the Appellant failed to do so. On 3rd September, 2018, the court below declined to set aside the judgment in default, and dismissed the Appellant's application, and thereby reaffirmed the order in the judgment in default that "*the*

Appellant gives the [Respondent] possession of his property [title no. 9/7] within 14 days..." from the date of the earlier order. It is clear from the available evidence before this Court that although the Appellant file a notice of appeal on 5th September, 2018, for over a year after the filing of the notice of appeal, the Appellant failed to serve and/or facilitate the service of the notice of appeal on the Respondent. Indeed, the Appellant also did nothing to prosecute the appeal; the Appellant did not even file skeleton arguments in support of his appeal or initiate the process of settling the record of appeal. The clear inordinate and inexcusable delay, and failure, to serve or to facilitate the service of the notice of appeal on the Respondent, for more than a year after the notice of appeal was filed, certainly gives credence to the Respondent's contention that "the Appellant only wants to use the notice of appeal to obtain the stay of execution". The Appellant has been a passive litigant. Indeed, if the truth be told, the Appellant only again appeared actively on the scene after the Respondent commenced enforcement proceedings for the possession of his property. In this regard this Court is of the firm view that having regard to all the circumstances and justice of the case it unconscionable for the Appellant to continue depriving the Respondent the fruits of his litigation. This Court is, therefore, inclined to strike out the notice of appeal, as prayed by the Respondent, AND IT IS SO ORDERED.

6. *Conclusion*

6.1 The Appellant's application herein is dismissed and the Appellant's notice of appeal filed on 5th September, 2018 is struck out.

6.2 Costs for the Respondent.

Pronounced in Chambers at Blantyre on this 7th day of November, 2019.

Justice Anthony Kamanga, SC
JUSTICE OF APPEAL