



Malawi Judiciary



**IN THE MALAWI SUPREME COURT OF APPEAL**

**MSCA CIVIL APPEAL NO 44 OF 2019**

**(being High Court Commercial Case No. 342 of 2018)**

**BETWEEN**

**FIRST MERCHANT BANK ..... APPLICANT**

**AND**

**ISMAIL PROPERTIES LTD ..... RESPONDENT**

**CORAM : THE HONOURABLE JUSTICE E. B. TWEA SC JA**

**COUNSEL FOR THE APPELLANT – MTOKALE**

**COUNSEL FOR THE RESPONDENT – MASUMBU**

**RECORDING OFFICER – MASIYANO**

**RULING**

**TWEA SC JA**

On 14<sup>th</sup> instant I ruled that the applicant herein be heard on stay of execution of judgment and application for extension of time to appeal.

I must mention at the outset that this case has caused me anxious moments.

I heard the parties on 18<sup>th</sup> instant. To appreciate the issues in this case, it would be better to start with the chronology of the events, briefly.

The record has it that the claim in this case was filed on 18<sup>th</sup> October, 2018. The respondent filed a response on 30<sup>th</sup> October 2018. Be this as it may, the respondent did not file a defence. The claimant, on 7<sup>th</sup> January 2019, obtained a judgment in default. The following day, 8<sup>th</sup> January 2019, the claimant executed for the whole amount of the judgment. The amount executed however was not disclosed in the affidavits. However, it was disclosed that the sheriff fees were in excess of K24,000,000.00. The respondent filed for and was granted a stay of execution on 10<sup>th</sup> January 2019. Later it applied to set aside the judgment. The hearing to set aside the judgment was heard inter-parties on 5<sup>th</sup> January, 2019. However the application to set aside was denied and the stay of execution was discharged.

The respondent filed a stay pending appeal which was denied on 15<sup>th</sup> January 2019.

It is on record that the respondent filed for a stay of execution pending and inter-parties application to set aside the judgment before a judge. This was granted and the application was set down for hearing on 25<sup>th</sup> May 2019. On this day however, the judge held that the Court below did not have jurisdiction to hear the inter-parties application to set aside the judgment in default. The respondent hence brought this present application.

I must mention that events in this case developed very fast. This Court does not have some of the documents that the parties relied on. It is fair to say that there were several procedural failures on both sides; some of which the Court below contributed to. In the course of hearing the case, it came to light that the "tenancy agreement or arrangement" in issue was between the claimant and Opportunity Bank of Malawi Limited. It also came to light that Opportunity Bank of Malawi Limited



does not exist anymore. It is not on record when the said Bank stopped operating. What emerged from the record however, is that there was a transaction, between the applicant and Opportunity Bank of Malawi Limited. None of the parties referred to it in particular: whether it was a takeover, merger or voluntary reconstruction. What comes out clear however is that the respondent claims that the “tenancy” still subsists. The applicant however, claims that their Bank was in the process of verifying the arrangements in respect of the tenancy in issue apart from making arrangements to pay and have it terminated. In the course of submissions both parties have pushed the burden to the other, to establish whether or not the “tenancy” existed, survived the takeover, merger or reconstruction and is still subsisting. In my ruling of 14<sup>th</sup> instant, I referred the parties to consider the arrangements between the applicant and Opportunity Bank of Malawi Limited: the details of the takeover, merger or reconstruction that would inform liability in this case. The parties did not really address the issue, which in my view is the root of the claim.

Having heard the parties and read the skeleton arguments, I am inclined to grant the applications.

Let me start by stating that in a trial the parties are entitled to be notified when the judgment, order or decision of the court will be rendered. The rendering of a decision, order or judgment affects the rights of the parties which are limited by the time to appeal: see Alliance One Tobacco Limited vs Greenland Limited MSCA Civil Appeal 4 of 2012. (unreported). In the present case there was a Judgment in Default. The claimant did not, as per record, serve or notify the other party of the Judgment. It chose to execute the next day. It is well to argue that a judgment takes effect from the time it is pronounced, however, this is not an excuse or licence to ignore procedure to notify or indeed, in some cases, to draw up, file and serve the formal order on the other party.

A judgment determines the rights of the parties. It must be notified to the other party. I have also considered the finding of the learned Assistant Registrar. Had he examined the facts in this case, he would have found that the “tenancy” agreement was with a Bank that no longer exists. His decision may have been different on the reasons that he preferred in his ruling. Further, the Court below ruled that it had no jurisdiction over appeals from the Registrar. This was not fully articulated before this Court. However, it was submitted that the proceeding before the Judge had profound influence on the conduct of this case.

Let me say that this Court would have wished that the parties seriously examined the facts and issues and present them to the court so that there is no risk of injustice to any of them. I refer the parties to the cases of FDH Bank Limited vs Maranatha Girls Academy MSCA Civil Appeal 22 of 2016, and, Mike Appel and Gatto Vs Saulos Chilima MSCA Civil Appeal 20 of 2013 which have been cited. I find that there is an arguable case to go for appeal and that this case, so far as it has developed, raises a real risk of prejudice to one or both of the parties. I say this fully aware of the shortfalls on both sides.

I therefore grant the stay of execution. I also grant enlargement of time to appeal. The applicant must file the appeal within 21 days of this order. I make no order on the sheriff fees. This was not within the scope of my ruling of 14<sup>th</sup> June, 2019 and has not been fully argued before me.

Costs will be in the cause.

Pronounced in Chambers this 26<sup>th</sup> day of June 2019 at Blantyre.



**JUSTICE E.B. TWEA SC**  
**JUSTICE OF APPEAL**