



**REPUBLIC OF MALAWI**

**IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE**

**MISC CIVIL APPLICATION NO. 09 OF 2022**

**BETWEEN**

**BENTRY CHITAYA----- 1<sup>ST</sup> APPELLANT**

**CHOSANI CHITAYA----- 2<sup>ND</sup> APPELLANT**

**SOPHIE CARLO CHITAYA(MRS MWASE)---3<sup>RD</sup> APPELLANT**

**LINDA CHITAYA----- 4<sup>TH</sup> APPELLANT**

**AND**

**CHIUKEPO CHITAYA----- 1<sup>ST</sup> INTERESTED PARTY**

**CHUMA CHITAYA----- 2<sup>ND</sup> INTERESTED PARTY**

**EMILY CHITAYA-----3<sup>RD</sup> INTERESTED PARTY**

**MWAYI CHITAYA-----4<sup>TH</sup> INTERESTED PARTY**

**TIYANJANE CHITAYA----- 5<sup>TH</sup> INTERESTED PARTY**

**PAWEME CHITAYA-----6<sup>TH</sup> INTERESTED PARTY**

**CORAM: HON. JUSTICE M.C.C. MKANDAWIRE JA**

Minjale, Counsel for the Appellants

G.Ghambi, Counsel for the 1<sup>st</sup> Interested Party

## Minikwa, Recording Officer

### **RULING**

1. This is an application for an order dismissing the appeal for want of prosecution. The application is brought pursuant to Order 111 Rule 17(3) of the Supreme Court of Appeal Rules. There is an affidavit in support of this application made by Chuma Chitaya the 2<sup>nd</sup> Interested Party. The Appellants did not file in any response opposing this application. When the matter came for hearing on the 18<sup>th</sup> of January 2023, counsel for the Appellants a Mr Minjale informed the Court that he was appearing on brief on behalf of counsel Mwafulirwa. It was his plea that the matter should be adjourned so that the Appellants are given an opportunity to file the response opposing the application. Counsel Minjale explained that the Appellants had failed to file a response and other necessary documents due to logistical challenges at their chambers in Mzuzu. He attributed the blame on the laxity of the clerks at their chambers in Mzuzu.

2. After listening to both parties, I ordered that we proceed with the hearing because I did not find any reasonable excuse from the Appellants warranting the adjournment of this matter. In a nutshell, the Appellants were not serious in the way they were approaching this appeal.

3. The affidavit in support of this application is very long. It has 39 paragraphs. However, a survey of this affidavit shows that the relevant part of this application is covered from paragraphs 35 to 39.

4. In paragraph 35, the 2<sup>nd</sup> Interested Party said that the Appellants filed the notice of appeal on 4<sup>th</sup> October 2021. Since 2021 which is 400 days ago, the Appellants have not made any progress on appeal in the Supreme Court but they effectively managed to get dates for stays and orders yet the Interested Parties have not been served with any date for settlement of court records or proposed items to be included in the court record. Even skeleton arguments have not been filed.

5. On the 7<sup>th</sup> of October 2021, the Appellants were granted an order of stay suspending the High Court judgment and the order was vacated on the 4<sup>th</sup> of March 2022 by the High Court and later restored by the Supreme Court on the 8<sup>th</sup> of March 2022. The Interested Parties say that their comforts on stays influences the Appellants not to take any steps on prosecution of the appeal.

6. The 2<sup>nd</sup> Interested Party says that on several occasions the Appellants have not complied with court orders and directions during proceedings. To buttress this fact, copies of certificates of non-compliance exhibited as CC5 and CC6 are attached to the affidavit of the 2<sup>nd</sup> Interested Party.

7. The Interested parties through their affidavit cited several case authorities dealing with matters of this nature. The case of **Attorney General vs Msalika MSCA Civil Appeal Number 38 of 2016** is very instructive as to the responsibilities of the Appellants in preparing the records of appeal and ensuring that the record is settled. Going further, the case of **Chiponda vs Chilumbu MSCA Appeal No. 49 of 2015** gave guidance on what it means for a delay to be inordinate. The skeleton arguments also looked at Practice Direction No. 1 of 2010 dealing with filling of skeleton arguments.

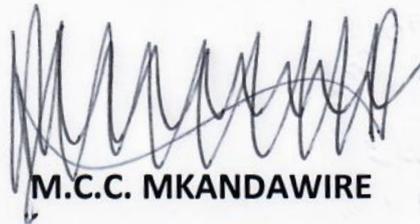
8. As already stated, the Appellants have nothing to rely on in this matter. Using my last sense of justice, I allowed counsel for the Appellants to orally address me. In the course of responding to what the Interested Parties had submitted through their counsel, the Appellants' counsel fished out a document showing that on the 8<sup>th</sup> of July 2022, they had filed documents with the Court below which required to be issued out by the Registrar at the Mzuzu High Court Registry. Counsel therefore shifted the blame to the Registrar at the High Court Mzuzu. Counsel further submitted that this was beyond their control.

9. Having listened to both parties, my finding is that the Appellants are not serious with this appeal. The strong impression that I have formed is that the Appellants are entertained to falsehood that since they have obtained stay of execution of the judgment, then there is no immediate need to be pushing for this appeal. Since October 2021, the Appellants have not bothered to file skeleton arguments which flouts Practice Direction 1 of 2010 as such documents are supposed to be filed within 14 days from the date of notice of appeal. Filing of skeleton arguments does not require the signature of the Registrar. Whilst the Appellants have been busy up and down obtaining stays of execution, the Appellants have been completely passive when it comes to settlement of the court record. Since 8<sup>th</sup> March 2022, when this court vacated the stay by the High Court, the Appellants filed documents with the court below on 8<sup>th</sup> July 2022 some 90 days thereafter. If they were indeed

ready, able and willing to prosecute this appeal, there is no way they could have just sat idle for 90 days before filing the documents for the Registrar's signature.

10. Having given the case the best of its scrutiny, I find that the Appellants have been using stays as a means to an end. However, taking into account that the Registrar may not indeed have issued the documents, I order that within 15 days from the date this ruling is issued out, the Registrar at the Mzuzu High Court Registry should issue out the documents. I further order that settlement of the record herein should be done and completed within 30 days from the date the Registrar issues out the documents. I further order that the stay of execution that I had granted on 30<sup>th</sup> of March 2022 is hereby lifted. Costs to the Interested Party.

**MADE IN CHAMBERS THIS 8TH DAY OF FEBRUARY 2023 AT BLANTYRE**

A handwritten signature in black ink, appearing to read 'M.C.C. Mkandawire', is written over a faint circular official seal.

**M.C.C. MKANDAWIRE**

**JUSTICE OF APPEAL**