



MALAWI JUDICIARY
IN THE SUPREME COURT OF APPEAL
SITTING AT BLANTYRE
MSCA CIVIL APPEAL NO 04 OF 2021

(Being Commercial Case No. 48 of 2016, High Court Commercial Division, Blantyre Registry)

BETWEEN:

E.D. KAKHOME-----APPELLANT

AND

NATIONAL BANK OF MALAWI FOR

INDE BANK LIMITED-----RESPONDENT

CORAM : HON. CHIEF JUSTICE R.R. MZIKAMANDA SC, JA

HON. JUSTICE L.P. CHIKOPA SC, JA

HON. JUSTICE F.E. KAPANDA SC, JA

HON. JUSTICE H.S.B. POTANI, JA

HON. JUSTICE J. KATSALA JA

HON. JUSTICE I. C. KAMANGA JA

HON. JUSTICE M.C.C. MKANDAWIRE JA

E. Banda, Counsel for the Appellant

Mwangomba, Counsel for the Respondent

W. Shaibu, Judicial research Officer

Mr Minikwa/C. Masiyano, Recording Officer

Msimuko, Court Reporter

RULING

1. This matter has got an interesting background. By a writ of summons dated 17th March 2014 the appellant commenced this matter against the respondent at Zomba High Court Registry seeking various reliefs. On 30th April 2014 the respondent filed a defence.
2. On 28th May 2014, the matter was transferred from Zomba High Court to the High Court Commercial Division in Blantyre.
3. On 6th and 12th of May 2016, parties held mediation but failed to agree a settlement. On 16th June 2016, a scheduled conference was held and the court below gave its directions on further conduct of the matter.
4. A pre-trial conference was supposed to take place on 3rd August 2016 but the appellant did not attend court and the matter was dismissed for want of prosecution.
5. On 12th October 2016, the appellant successfully applied to have the matter restored. The court below ordered that a pre-trial conference be held on 1st November 2016 which was actually held on 22nd of November 2016. The court held that a further pre-trial conference be held on 19th December 2016. On this date none of the parties appeared before the Judge at the appointed time and the matter was struck off the cause list.
6. On 18th October 2018, the appellant made an ex-parte application to restore the matter.
7. The court ordered that the matter be heard inter-partes. On 25th January 2019, the inter-parte hearing was held. The court declined to restore the matter on the grounds that it had *been* dismissed and restored before and that the second dismissal happened 2 years prior and there had been undue delay on the part of the appellant to make the application to restore.
8. The appellant not satisfied with the ruling of the court below appealed to this court. The grounds of appeal were as follows:
 - i) The lower court erred in law and fact in (sic) dismissing the hearing of the pre-trial conference for non-attendance in light of the fact that the counsel for the appellant and counsel for the defendant were actually sitting in the office

of the Judge's Secretary and waiting to go in the Judge's chambers for hearing when the Judge so dismissed it;

ii) The Learned Judge failed to observe the absence of the court clerk in his office and to take judicial notice of the fact that it is the court clerk who ushers the court users into the Judge's Chambers;

iii) The Learned Judge erred in first not checking with the court clerk as is the practice and had he so checked the Learned Judge would have known that both counsel were present;

iv) The Learned Judge erred in dismissing the hearing as there was no proper cause for so dismissing;

v) The Learned Judge erred in dismissing the action instead of only dismissing the particular process that is removing the particular application or process from the cause list;

vi) The Learned Judge erred in refusing to serve the pre-trial conference proceedings and thereby dismissing the action by default;

vii) The Learned Judge failed to heed the fact that the pre-trial conference proceedings could be restored with an order for costs as compensation to the other party and

viii) The Learned Judge failed to appreciate the facts that there was an earlier notice of adjournment filed which the court did not process and as such there was no fault on the Claimant.

9. On 24th March 2022, the respondent filed a notice of intention to rely upon a preliminary objection pursuant to Order 111 rule 14 of the Supreme Court of Appeal Rules. The respondent also filed skeleton arguments in support of the same.

10. The grounds of the said objections were as follows:

i) The ruling or order appealed against was made by a Judge in Chambers therefore, as prescribed under section 21(c) of the Supreme Court of Appeal Act, the appellant ought to have obtained leave to appeal.

ii) The notice of appeal does not comply with section 21 (c) of the Supreme Court of Appeal Act and therefore invalid and ought to be struck out with costs.

11. On 29th March 2022, the appellant filed skeleton arguments in opposition to respondent's preliminary objection.

12. When the matter came for hearing the appeal on 5th April 2022, focus was first on the preliminary objection raised by the respondent.

13. As we understand this preliminary objection, the core issue for determination is whether the appeal before us is incompetent on the ground that the appellant did not obtain leave to appeal.

14. In arguing this application, the respondent's counsel submitted that the requirement for leave as a condition to appeal is provided under section 21 of the Supreme Court of Appeal Act¹. This section provides:

21. An appeal shall lie to the court from any judgment of the High Court or any Judge thereof in any civil cause or matter:

Provided that no appeal shall lie where the judgment (not being a judgment to which section 68(1) of the constitution applies) is –

(a) an order allowing extension of time for appealing from a judgment;

(b) an order giving unconditional leave to defend an action;

(c) a judgment which is stated by any written law to be final;

(d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from the decree:

And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is-

(c) **an order made in chambers by a Judge of the High Court** (emphasis is ours).

15. The respondent's counsel referred this court to several case authorities in which a party to appeal and the appeal is without such leave such appeal is incompetent-see the cases of **Daurice Kanjedza Nyirongo v Council of Mzuzu University**²,

¹ Cap: 3:01 of the Laws of Malawi

² MSCA Civil Appeal No. 24 of 2018

Malawi Revenue Authority v Laura Kandulu³ and Malawi Telecommunications Malawi Limited v Henry Kabathi and Others⁴

16. In responding to the preliminary objection, the appellant's counsel submitted that Order 111 rule 2 of the Supreme Court of Appeal Rules provides:

If leave to appeal is granted by the court, or by the court below, the appellant shall file a notice of appeal.

Provided that nothing in this sub-rule shall be deemed to prohibit an appellant from filling a notice of appeal prior to the hearing of the application for leave to appeal.

17. The appellant's counsel therefore submitted that the court below granted leave after the filling of the notice of appeal and before the hearing of the appeal. The appellant's counsel further submitted that the cases cited by the respondent's counsel can be distinguished from the present case because in the cited cases, there was no leave granted by the court below.

18. We have gone through the documents on the record of appeal as well as the original court file. First, we noted that the court below on 25th January 2019 dismissed the appellant's application to restore the matter to the cause list. It is this dismissal that aggrieved the appellant hence this matter before us.

19. Our perusal of the original court file shows that the appellant filed a notice of appeal. This notice of appeal is allowed under Order 111 rule 3(2) of the Supreme Court of Appeal Rules. What is however vexing about this notice of appeal are the different filing dates on it. The appellant through chronology of events asserts that the notice of appeal was filed on 30th January 2019. However, a look at the notice of appeal shows that the notice of appeal was filed on 19th February 2019. The same notice of appeal has several court stamps. There is a court stamp for the cash office Chichiri High Court dated 31st January 2019 and another court stamp for the Blantyre Commercial Court Division cash office in Blantyre dated 19th February 2019. All these discrepancies tell a story that someone was desperately trying to conceal something or that whoever filed these documents did not know what he or she was doing.

20. After all these observations, we have come to the conclusion that the appellant was supposed to file the notice of appeal with the Commercial Court Division

³ MSCA Civil Appeal of No. 51 of 2016

⁴ MSCA Civil Appeal No. 86 of 2015

Blantyre. The correct court stamp is therefore the one from the Commercial Court Division Blantyre dated 19th February 2019. This therefore means that the notice of appeal was correctly filed. Be that as it may, pursuant to section 23(1) (a) of the Supreme Court of Appeal Rules, the appellant filed the notice of appeal out of time since the 14 days period between the date of the dismissal of the appellant's application which was 25th January 2019 to date of filing notice which was 19th February 2019 had expired.

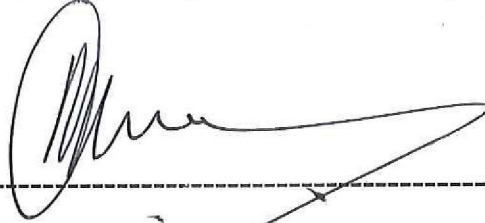
21. The appellant in the court below filed two applications. The first was for leave to appeal. The second was for leave to appeal out of time. Section 21 of the Supreme Court of Appeal Act gives jurisdiction to the court below to entertain applications for leave to appeal. As for application for leave to appeal out of time or extension of time to appeal, section 23(2) of the Supreme Court of Appeal Act confers such jurisdiction only on this court. It is therefore extremely amazing that the court below went ahead to entertain the application for extension of time within which to appeal yet it had no jurisdiction. The application to appeal out of time should have been brought before this court.

22. We therefore unanimously find that there is no competent appeal before us. We shall therefore not hear the parties and we accordingly sustain the preliminary objection with costs.

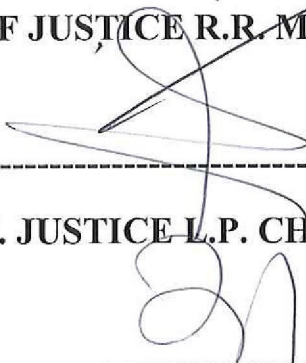
23. The court has noted with deep concern the manner in which the court below had handled the ex-parte application filed by the appellant in July 2021. Whilst we do appreciate that Order 11 rule 3(1) of the Supreme Court of Appeal Rules allows the court below to be moved ex-parte, the court below should however be very vigilant. For example, in this case, the applicant had moved the court below ex-parte after a period of 2 years. This court is of the view that in such circumstances, the court below should have exercised its discretion by ordering for inter-partes hearing especially where the court below would grant an order that is adverse to the other party as was the case here. Where there is inordinate delay in lodging an application, although the rules provide for ex-parte applications, the court below should be proactive in modern case management by ordering for inter-partes hearing. The same caution should be taken when handling matters of judicial review. Ex-parte applications should not be used to ambush the other party. For instance, it has become fashionable by Courts below in matters of judicial review in Chieftaincy matters where ex-part applications and injunctions have been entertained and

granted on the eleventh hour. This willy nilly approach has to be discouraged and stop.

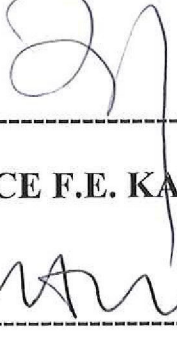
Made this 5th day of April 2022 at Blantyre.



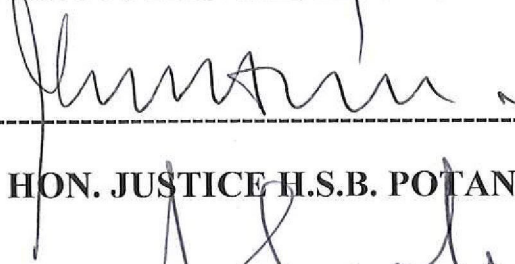
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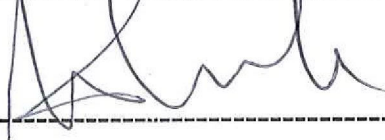
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