



**REPUBLIC OF MALAWI**

**IN THE MALAWI SUPREME COURT OF APPEAL**

**MSCA MISCELLANEOUS CIVIL APPEAL NUMBER 45 OF 2022.**

**(Being Commercial Cause Number 109 of 2021)**

**BETWEEN**

**NATIONAL OIL COMPANY OF**

**MALAWI LTD (NOCMA)-----APPELLANT**

**AND**

**FUEL TANKERS OPERATION ASSOCIATION-----RESPONDENT**

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

**P. Mpaka, Counsel for the Appellant**

**A. Ndhlovu, Counsel for the Respondent**

**C. Fundani, Recording Officer**

**RULING**

This is an application for stay of proceedings pending appeal brought under the Civil Procedure Rules Part 3 rule 3(1)(f) as read with Order 1 rule 18 of the Supreme Court of Appeal Rules. The application is supported by an affidavit made by Micklas

Reuben who is Director of Operations in the service of the appellant. In a nutshell, the contents of the affidavit are as follows:

1. The appellant has the statutory responsibility under the Liquid Fuels and Gas (Production and Supply) Act to deal with Liquid Fuels and Gas.
2. Apart from the appellant, any person whether private or public, domestic or foreign shall participate in the chain of supply of liquid fuels and gas but subject to those mentioned in section 5(g) of the said Act.
3. On 23<sup>rd</sup> March 2021, the respondent took out this case. The respondent then claimant asked the court below to declare the Delivered Duty Unpaid incoterm illegal. The summons in the court below summarized the claim as seeking "a declaration that the Delivered Duty Unpaid Method of importing oil into Malawi is illegal, an order of injunction restraining the defendant from using the DDU Method, damages for loss of business and costs of the action". The statement of claim is exhibit MR1.
4. The appellant fully defended the matter and a 581 page long trial bundle was produced and a two day trial was conducted whereby the respondent produced two witnesses who were thoroughly cross-examined by the appellant. On 1<sup>st</sup> of June 2022 the court below concluded the trial which lasted for two days.
5. After trial and after the court below had given directions for the preparation of submissions, the respondent moved the court for permission to amend its statement of case. The appellant objected and the court below directed that a formal application should be made.
6. On 22<sup>nd</sup> June 2022 the court below reluctantly allowed the amendment and gave directions.
7. The appellant lodged an appeal against the decision of the court below and the notice of appeal is exhibit MR2.
8. The appellant complied with the direction of the court below and filed an amended defence and list of documents.
9. The appellant applied for a stay in the court below but it was dismissed and the decision of the court below is exhibit MR3.

10. The appellant sought further directions on the conduct of the matter and the court below gave such directions as seen in exhibit MR4.

11. The appellant raises issues of fair trial whether the respondent can continuously adjust the framework and foundation of their case as they face huddles along the way and to do so after the conclusion of trial.

12. That guidance is required from the Malawi Supreme Court of Appeal for all stakeholders on what standards apply when one seeks to change their case framework at a stage like the case in the court below has reached.

13. The appellant says that it recognizes that there is a practice prevailing in the Supreme Court of Appeal not to entertain appeals where the case in the High Court is still on-going. In this case however, trial was concluded on the 1<sup>st</sup> of June 2022 before the ruling appealed from emerged on 21<sup>st</sup> June 2022 justifying the Supreme Court of Appeal in departing from the practice.

14. Failure to deal with the appeal as taken out likely creates a situation of unfair trial and will also make the appeal academic and otiose.

15. That the unique circumstances of this case therefore enjoin the appellant to implore this court to enter a stay of proceedings pending appeal the court below having refused to make such an order on 3<sup>rd</sup> August 2022.

The respondent opposed the application and their position is supported by an affidavit made by Mr Shepher Mumba. In a nutshell, it is as follows:

1. The respondent agrees with all the background narrative as given by the appellant.

2. The respondent however says that during trial, the appellants' witness testimony showed that the appellant was no longer using the DDU incoterm and was now using the Delivered at a Place incoterm(DPU). This was clearly confirmed during cross examination of the appellant's witness who was the last one to give evidence.

3. This is what made the respondent to think of recasting its case so that the declaration of illegality should not only be against the DDU but also DPU and any incoterm.



4. The respondent confirmed that after an application to amend statement of case was granted, the respondent filed an amended statement of case and the appellant filed an amended defence. Copies of the amended summons and statement of case and amended defence are exhibits SM3 and SM4 respectively.

5. The appellant filed a notice of appeal which is MR2. The appellant then took out an application for stay pending appeal. The application is exhibit SM5 and the sworn statement in opposition is exhibit SM6. The Court dismissed the application.

6. The appellant then duly took an ex-parte application to re-open the case so that the appellant be allowed to be heard on the amendments that were granted to the respondent and the court granted the order and scheduled the matter for a scheduling conference on 4<sup>th</sup> October 2022. Copies of the application and the order are exhibits SM7 and SM8.

7. The status of the case as of now is that the appellant has already filed trial checklist which is exhibit SM9.

8. With the re-opening of the case, there is no need for an appeal because it is like the matter is going to be heard again by the court on issues. The new position is as if the case had begun again.

9. The order on amendment is on an interlocutory application and the substantive matter has not been concluded.

10. It is also noted that the appellant is aggrieved with case management issues in the court below and there is nothing this court can do.

11. The respondent therefore prays that the appellant's application for stay of proceedings be dismissed with costs to the respondent.

I have looked at all the material that has been placed before me. I also listened to the submissions that were made by both counsel. I take it that the bulkiness of the affidavits and the so many case authorities submitted in this application should not deliberately overwhelm the court. This application is anchored on a very straight forward issue.

The appellant would like this court to grant a stay of proceedings pending an appeal that they are pursuing in the court. In the first place, I note that the decision of the court below from which the appeal emanates is a mere interlocutory decision. The

court below has not made any substantive decision. In other words, there is no final judgment worth appealing from. It is very clear that the court below has decided to allow the appellant to further directions as to how the amended statement of case will proceed. The court below has actually even set down a date for a scheduling conference. Instead of the appellant waiting for that day and see how things will unfold, the appellant thinks that this court has the magic stick. My observation is that this matter relates more to case management issues in the court below and it is my view that such gymnastics should not be a basis of an appeal to this court.

This court has made it very clear on times without numbers that it will not entertain inchoate appeals otherwise it will be flooded with interlocutory issues which can be best settled in the courts below. The case of **Professor Arthur Muthalika etal vs Dr Saulosi Chilima etal, MSCA Civil Appeal NO 47 of 2019** is very good authority on this.

I noted that counsel for the appellant passionately argued that this type of amendment made after trial of the case was over was unprecedented hence need for the interference of this court through a stay pending appeal. I was however left unmoved because most of the issues that counsel raised were purely case management issues and use of discretionally powers by the trial judge. These are issues which are already being attended to by the court below. It is therefore not the intention of this court to meddle into such issues at this level where there is no substantive decision by the court below.

The appellant should have their day in the court below. Let the appellant raise the pertinent procedural issues during the re-opening of the trial so that the re-trial is fair. From what I have read on the record and also reading the interlocutory ruling of the trial judge, I am satisfied that the court below will listen to them and will conduct the re-trial in a just and fair manner.

This application is dismissed with costs to the respondent.

Delivered in Chambers this 26<sup>th</sup> day of October 2022 at Blantyre.

A handwritten signature in black ink, consisting of a series of overlapping, stylized loops and lines, positioned above the printed name.

**JUSTICE M.C.C. MKANDAWIRE JA**