



**THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL CASE NO. 35 OF 2014**

BETWEEN:

THE STATE.....APPLICANT

AND

PAUL MONFORT MPHWIYO.....RESPONDENT

THANDIZO MPHWIYOINTERVENOR

CORUM: JUSTICE R.M CHINNAGWA

Saidi	Counsel for the State
Nundwe	Counsel for the State
Absent	Respondent
Soko	Counsel for the Intervenor
Nyirenda	Court Clerk

**RULING ON APPLICATION FOR STAY AND SETTING ASIDE OF ORDER OF
FORFEITURE**

Background

1. The Intervenor, seeks that an order of the Court made on 28th March 2024 forfeiting the Intervenor's matrimonial property in Area 43 [Alimaunde 43/2/877] be stayed and set aside.

2. The respondent and the intervenor are husband and wife. The respondent was charged with the offences of theft by public servant contrary to Section 278 as read with Section 286(1) of the Penal Code, money laundering contrary to section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act and conspiracy to defraud contrary to section 323 of the Penal Code. He was granted bail on 24th October 2014. One of the bail conditions was that the respondent be bonded by a residential house in Area 43. Following the revocation of the respondent's bail due to abscondment, this court forfeited amongst other bonded properties the residential house in Area 43.

The Arguments For and Against the Application For Stay and Setting Aside

3. The Intervenor argues that the general principle when dealing with stay is that the court does not make a practice of denying a successful litigant the fruits of his litigation. The court will only do so if there are good reasons for so doing: *Mike Appel & Gatto vs Saulosi Chilima [2013] MLR 231, MSCA*.
4. It was added that it is for the Intervenor to demonstrate why the interests of justice favour a stay: See *Mathanga v FDH Bank Ltd Civil Appeal No. 7 of 2017 (unreported)*.
5. It is argued that from the Court Ruling dated 28th March 2024 the Court was alive to the devastating impact of a forfeiture order on third parties. In particular, the Court wanted to know if the home was a matrimonial one. It would appear that instead of inviting the Intervenor to make representations, the State was content to simply make submissions highlighting that it was only the Defendant's name that appears on the property register. The fact that it's only a single spouse's name appearing on a property register is not conclusive evidence that the said property is not matrimonial. The Court should have looked at all of the facts including the facts of intention of the parties as well as their contributions. *Sikwese v Banda MSCA Civil Appeal Number 76 of 2015 (unreported)*. The Court should have taken judicial notice of the fact that it is common practice for married couples in Malaŵi to have family assets in the name of one spouse.
6. The Intervenor deponed that despite her name not appearing as joint proprietor of the property in question, she did substantially contribute financially and in kind on the acquisition and development of the property in question. Thus, the house in Area 43 cannot be forfeited against this interest in the property.

7. It was further argued under section 66 of the Financial Crimes Act that before forfeiture orders are made, care is taken to notify all persons who may have an interest in the property to come forward and make representations. Section 66 reads as follows:

(1) If a court makes a preservation order, the authority shall, within twenty-one days after the making of the order, give notice of the order to all persons known to the authority to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette or two newspapers of widest circulation in Malawi.

(2) a notice under subsection (1) shall be served in the same way as any other civil court process.

(3) a person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest in the property concerned from the operation thereof.

8. Thus, before the forfeiture order was made this court was supposed to invite the intervenor being an affected party in the forfeiture of the property in question.

9. Regarding the setting aside of the order of forfeiture, the intervenor argued that both application for stay and setting aside of the execution order had to be made at the same time considering that they had been served with a notice to vacate the property in question by end April 2024. Time is of the essence to avoid the intervenor being rendered homeless.

10. In addition, it was contended that where an order affects a party which ought to be heard but was not heard, the party need not appeal but pray to have the order set aside under the inherent jurisdiction of the court.

11. In response the State observed that the Supreme Court of Appeal in *Mulli Brothers Ltd v. Malawi Savings Bank Limited*, MSCA Civil Appeal No. 48 of 2014 and *Mike Appel and Gatto v. Saulos Chilima*, MSCA Civil Appeal No. 20 of 2013 laid down key principles to guide the Court when considering an application for stay of execution as follows: Firstly, the Courts will grant a stay in a case when it is necessary to secure the rights of a party. The primary consideration in the court's determination will be whether the applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay; Secondly, when courts are

exercising their discretion in applications of stay of execution of judgment, they should try to strike a balance between two considerations. First, the consideration that the court does not make a practice of depriving a successful litigant the fruits of his litigation; and second, the consideration that when a party has appealed, which is a right, the court should see to it that the appeal, if successful, is not rendered nugatory.”

12. It was further argued that the intervenor must demonstrate that justice favours the granting of a stay: *Ex Parte HRDC et al*, Judicial Review Case No. 33 of 2020, [R Ruling of 22nd March 2021.
13. It was further argued that the intervenor has not submitted documents attesting to her rights or contributions as she claims. The narrative of making contributions and applying in the name of the accused person in order to secure an offer of land does not have the legal or policy backing and therefore wanting.
14. Furthermore, it is stated that even assuming there was a triable issue the intervenor has not demonstrated what she would like to do after the stay. It is a stay pending nothing with no appeal.

Issue for Determination

15. In this ruling the court will first deal with the application to stay the order of forfeiture and thereafter, consider the application to set aside the order of forfeiture?

Analysis of Law and Evidence

16. This determination springs forth on the basis that the courts forfeiture order was a final order.
17. Secondly, as the parties have observed there is no prescribed procedure in the Criminal Procedure and Evidence Code for such an order to be stayed by the High Court.
18. The forfeiture order was made under section 121 of the Criminal Procedure and Evidence Code. Section 121 (1) of the Criminal Procedure and Evidence Code states that “When any person is required by any police officer or court to execute a bond, with or without sureties, such police officer or court may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or property to such amount or value as the police officer or court may require in place of, or in addition to, executing such a bond; and such amount or value shall be fixed with due regard to the circumstances of the case and shall not be excessive’.

19. Section 121 (2) of the Criminal Procedure and Evidence Code states that “Where any money or property has been deposited in accordance with subsection (1) and it is proved to the satisfaction of a court that the depositor has not fulfilled the conditions upon which such money or property was deposited, the court shall record the grounds of such proof and may call upon the depositor to show cause why such money or property should not be forfeited, and if sufficient cause is not shown or if the court is satisfied that the depositor has absconded or cannot be traced the court may order such money or property to be forfeited’.
20. As quoted above section 121 of the Criminal Procedure and Evidence Code does not provide for procedure of stay of forfeiture order.
21. It is also interesting to note that the Bail Guidelines Act has no procedure on forfeiture of bonded property and stay of forfeiture. The Tanzanian Bail Guidelines, September 2000, would be one piece of legislation our jurisdiction could borrow and improve on. It captures the bail process in quiet some detail.
22. Relevant to the issues before this court, the Bail Guidelines of Tanzania provides as follows:

Article 3.6.5. Deposit of Property

(a) the court may order the accused or any person on his behalf to deposit movable property or a document evidencing ownership of immovable property whose value corresponds to the amount of the bail. (b) if the deposit involves a matrimonial landed property, the document evidencing ownership shall be accompanied by spousal consent. 15 (c) where there is any doubt as to the validity of the deposited property, the court may order verification of such document by any relevant authority. (d) the court shall record in a special register all properties deposited as security for bail. The register shall contain the following particulars: i. ii. iii. iv. v. case number; name of accused; date of release; name of the trial magistrate; name of the depositor; vi. name of receiving officer/ court clerk; vii. type and description of deposited property; viii. date the property was deposited; ix. name of officer returning the security; and x. 16 name, signature and ID card of the person or depositor to whom the property is returned

Article 5.2. Forfeiture

Section 160 of the CPA sets out procedures for forfeiture where an accused jumps bail as follows: 19 Section 155(1) of the Criminal Procedure Act [Cap. 20 R.E.

2019]. 20 (a) where the accused jumps bail, and the surety fails to procure him, the court shall summon the surety to appear before it within reasonable time, to show cause why his bond should not be forfeited and if he fails to show cause, the court shall determine the amount to be forfeited; 20 (b) where the court orders forfeiture, it shall give the surety reasonable time to pay the amount determined and in case of default, the court shall issue warrant of attachment and sale of surety's movable property or his estate if he is dead; 21 (c) where a surety to a recognisance dies before the recognisance is forfeited, his estate shall be discharged from all liability in respect of the recognisance; 22 and (d) if the penalty amount is not paid and cannot be recovered by attachment the surety shall be liable to six months imprisonment.

23. The Tanzanian law on bail is surely something to learn and build on as the Malawian Bail Guidelines Act is silent on issues of bonded property and forfeiture of bonded property.
24. Moving on with the search, the Courts Act does not give the High Court jurisdiction to stay its own orders but rather accords general supervisory and revisionary jurisdiction over all subordinate courts on both criminal and civil matters under sections 25 and 26 of the Courts Act.
25. The powers of review in the Courts Act have been articulated in section 125(6) of the Criminal Procedure and Evidence Code which gives the High Court powers to entertain a review of a decision on the forfeiture of a bond made by any magistrate.
26. Section 11 of the Supreme Court Rules allows 'any person aggrieved by a final judgement of the High Court in its original jurisdiction to appeal to the Court'.
27. It is this court's view that the application for stay of execution cannot be entertained on the inherent jurisdiction of the court on account of section 11 of the Supreme Court Act. An appeal and not a stay is the remedy for the intervenor. The inherent powers of the court should in this court's view be sparingly invoked and in circumstances as explained in *Bottoman & Anor. v R (None)* [2015] MWHC 441 (28 October 2015) where the court quoted a statement on the principle of inherent jurisdiction of courts in *Golden Forest Holdings Limited v Bank of Nova Scotia* (1991) 98 N. S. R. 2ND 429 (1990, NSCA) where it was stated that '*...the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular*

to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." The intervenor has not demonstrated the need to invoke the inherent powers of the court where an appeal remedy exists.

28. If for arguments sake, this court would entertain the stay it is this Courts view that the same would be dismissed for several reasons. First, the law on forfeiture of bonded property as provided in section 121 of the Criminal Procedure and Evidence Code was diligently followed. All that this court was required to do was to invite the respondent that he show cause why the property should not be forfeited. There is no further requirement that other persons be invited to show cause why. This would simply be for the reason that the property in question was voluntarily surrendered as the respondent's property.
29. The application of section 66 of the Financial Crimes Act to forfeiture of bonded property was raised but this was not fully argued out as to how it applies to this matter. This court is of the view that the section does not apply to forfeiture of property bonded as part of bail bonds under section 121 of the Criminal Procedure and Evidence Code. Section 66 of the Financial Crimes Act deals with giving of notice of preservation order to persons with interest in the property which is subject to preservation order to persons with interest in the property which is the subject of the preservation order made by a court under section 65. These two procedures are different and analogues cannot not be drawn and made applicable to the matter which were dealt with by this court in the forfeiture order.
30. Second, following the cases of Mulli Brothers Ltd and Mike Appel and Gatto cited above, this court holds the view that there is no necessity to protect any rights the intervenor claims to have in the forfeited property through an order of stay. Any such right can be enforced against the respondent through appropriate court processes and if substantiated appropriate reliefs including damages can be awarded against the respondent.
31. Third, the respondents release was secured on the property in question, amongst others, to ensure his availability for trial. Now, if at the time of enforcement, properties are withdrawn, it surely is a mockery to justice. It is quite interesting to note that the intervenor is picking and choosing which of the bonded property is matrimonial property for which her rights are to be enforced. If this argument was to be stretched further, it would be that the respondents share would still have to be

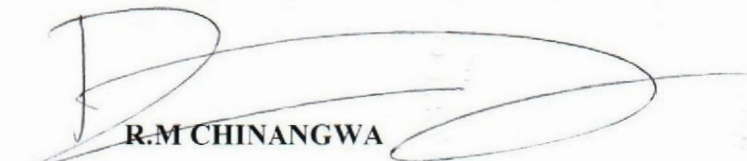
forfeited. As stated in this court's ruling dated 28th March 2024, it is this court's belief that the respondent, having been legally represented at the time of his bail application in the year 2014, should have been informed by Counsel on the need to surrender properties that are free of encumbrances; and the consequences of absconding bail on the bonded properties.

32. Fourth, the forfeiture order being a final judgement, this court becomes functus officio.
33. The application for stay thus lacks merit and is dismissed.
34. Regarding the application to set aside the order of stay, this court notes that the application to stay having been denied the application to set aside falls away.

Finding

35. The application for stay of the order of forfeiture is dismissed this court having no jurisdiction to stay its final judgement.

Pronounced this 23rd day of April 2024 at LILONGWE



R.M CHINANGWA
JUDGE