



**REPUBLIC OF MALAWI**  
**IN THE SUPREME COURT OF APPEAL**  
**SITTING AT BLANTYRE**  
**MSCA CIVIL APPEAL NO. 31 OF 2016**

(Being High Court, Principal Registry, Civil Cause No 3095 Of 2002)

**BETWEEN**

**SOUTHERN BOTTLERS .....DEFENDANT/APPELLANT**

**AND**

**STALLONE MAULISU .....CLAIMANT/RESPONDENT**

**CORAM: HON. JUSTICE I.C. KAMANGA SC, JA**

Gondwe, Counsel for the Applicant

Mbendera, Counsel for the Respondent

Mr. Chinkono, Recording Officer

**RULING**

This court was moved on application to dismiss notice of appeal for want of prosecution and failure to file skeleton arguments within the prescribed time. The application was made under Order III rule 9 of the Supreme Court of Appeal Rules as read with Practice Direction 1/2010.

## **BACKGROUND**

I should start by acknowledging that this matter is very old. According to the citations herein the matter has been in the corridors of justice for a period of twenty-two years. It was registered in the High Court in the year 2002. Upon conclusion in the High Court, the party that was aggrieved with the decision of the court below sought to appeal against the judgement in 2016. Several applications have been made in this Court since that time.

The Appellant in this matter, Southern Bottlers was the Defendant in the court below where the Respondent in this matter was the Claimant/Plaintiff. The Respondent had, in the court below, lodged a claim against the Appellant herein, seeking compensation for wrongful dismissal and the verdict after full trial was in favour of the Claimant/Respondent. Judgement was rendered on 9<sup>th</sup> March 2016 in the absence of the Appellant herein. And Appellant became live to the judgement on 10<sup>th</sup> May 2016 when they were served with a Notice of Assessment of Damages which was scheduled for hearing on 26<sup>th</sup> May 2016. Time within which an aggrieved party could appeal had lapsed on 19<sup>th</sup> of April 2016. Thus, Appellant's Counsel moved this Court *ex parte* on 23<sup>rd</sup> May 2016 on summons for extension of time of appeal. During the application, the Appellant's Counsel had exhibited draft copies of Notice of Appeal as well as grounds of appeal that were to form the basis of the appeal. This Court allowed the application and extended the time within which the Appellant could file his appeal for a further thirty days from the date of 26<sup>th</sup> May 2016.

The Appellants have never taken any action that would facilitate or ensure that the appeal is heard up to now.

On 23<sup>rd</sup> February 2022 the Respondent moved this Court on application to dismiss the Notice of Appeal for want of prosecution and for failure to file skeleton arguments within the prescribed time in compliance with Order III rule 9 of the Supreme Court of Appeal Rules and Practice Direction No 1/2010.

The Respondent filed an affidavit in support of the application in which he deponed that he obtained a judgement in his favour in the court below to which the Appellant had indicated to this Court that he would appeal. The Respondent's Counsel undertook to prepare a Consent Order settling the Record of Appeal by 14<sup>th</sup> November 2017 but took no action to honour the undertaking. Five years have lapsed since the Order to file the Notice of Appeal and no further action has ever been made taken by the Appellant to prosecute the appeal. The Respondent

submitted that the inordinate delay and the non-prosecution is an indicator that the Appellant has abandoned the appeal.

The Appellant opposed the application to dismiss the appeal for want of prosecution. Counsel for the Appellant attributes non prosecution to the Court by stating that prosecution stalled due to failure on the part of the court to prepare a Record of Appeal. He stated that at the point of preparation of the Record of Appeal, the court, through a clerk, informed the lawyer who was seized of the matter of the firm of Savjan and Company, that the court file was missing.

A copy of an agreed order for settlement of record was presented which has endorsements of documents that were to constitute the Record of Appeal as evidence that Appellant intended to prosecute the appeal. Appellant's Counsel further stated that since the time that the Appellant was informed of the missing file, no further information has been provided by the court as to the location of the court file despite numerous follow ups with the court. Consequently, the missing court file has precluded the Appellant, through no fault of its making, from proceeding with the appeal process. And in the circumstances, it would be in the interest of justice and fairness that the Appellant should be afforded the opportunity to prosecute the appeal that was commenced.

## **THE PROCEDURAL LAWS/RULES**

Order III of the Rules of the Supreme Court applies to appeals from the court below with regard to civil matters. Order III rule 9(1) obliges the Appellant with the responsibility for the preparation of the record in the following terms:

9(1) "the appellant shall be responsible for the preparation of the record which shall be certified as correct by the Registrar of the Court below."

Much as the responsibility for the preparation is placed on an appellant, supervision thereof is placed on the Registrar of the court below. Hence Order III rule 9(2) states that:

"The preparation of the record shall be subject to the supervision of the Court below and the parties may submit any disputed question to the decision of a Judge of the Court below in chambers who shall give such directions thereon as the justice of the case may require."

A reading of Order III rule 10 impresses and lays the responsibility on the Registrar to file the record in the Court when ready.

Practice Direction No 1 of 2010 attends to skeleton arguments in the Supreme Court of Appeal. It states that parties in an appeal or other matter in the Supreme Court of Appeal are required to present skeleton arguments in accordance with it. And in particular, when presenting skeleton arguments in this Court in all substantive appeals, the appellant must file with the Court skeleton arguments fourteen days (14) days after filing the appeal in this court and during the same period serve a copy of the skeleton arguments on the respondent.

### **COURT'S ANALYSIS AND DETERMINATION**

A look at the Agreed Order for Settlement of Record that Appellant's Counsel refers to is not dated, it does not have the Appellant's signature neither does it have the Registrar's endorsement. It only has the Respondent's Counsel's signature. This is an indication that the agreed order that the Appellant seeks to produce as evidence of action on their part was actually prepared by the Respondent and not by the Appellant as averred in the Respondent's Counsel's statement. It thus testifies more to the fact that the Appellants have not been interested in prosecuting their appeal to the extent that the Respondent was taking action on their behalf, yet the Appellant still failed to sign the agreed Order and present it to the Registrar for his action. Again, Respondent's Counsel attached to his statement a reminder to the Appellant's Counsel where the Respondent's Counsel was asking the Appellant to comply with the undertaking that he had made to facilitate preparation of the record for appeal. When all these are considered, the only reasonable conclusion that should be drawn is that the Appellant never moved the Registrar with regard to the preparation of the Record of Appeal.

It is interesting to note that the clerk that told the lawyer from Savjani and Company that the file was missing is not mentioned by name neither do we have a statement from the clerk endorsing the statement that the file is missing. In so far as the statement that the file is missing is made generally and has no author or name of the officer of the court who uttered the same, this Court will not allow it to be a fact. It is high time that the allegations of missing files from the Court Registries be supported by sworn statement or testimony of the clerk who testifies to Counsel that a file is missing. A statement by Counsel that he was told by a court clerk, who has

no name, that the file was missing is hearsay and it cannot be relied on by this Court to form part of the information that will assist this court to arrive at a decision.

Counsel also indicated that there have been numerous follow ups in vain, again, there is no record of the follow ups that is attached. I will reproduce the handover note that forms the basis of the allegation that the missing file was at the instance of the court. It actually reveals that the Appellant had stalled in its efforts to prosecute the appeal. The handover note reads:

“21<sup>st</sup> September 2021

...

Nature of Matter:

This was an action by the claimant in the High Court, Principal Registry for damages for wrongful dismissal. Trial took place in 2012 before Kalembera J.

Stage Reached:

In 2016 we learnt that the Judge had delivered a judgement in favour of the Claimant. The Judgement was only given to the Claimant’s lawyers and we learnt of it when they sought to have assessment of damages. We appealed against the judgement and obtained a stay against its enforcement. However, progress stalled at preparation of Record of Appeal. The court file was said to be missing.

Next Step:

**The Claimant’s lawyers have strangely not enquired on the matter since 2018. Consider following up with the High Court on the Agreed Orders for settlement of Record and prepare a Record of Appeal and progress the matter to hearing. It is worthwhile reminding the client about existence of the matter since we have not communicated with them recently.”** [emphasis supplied].

There is clear and outright admission in the Appellants’ Counsel’ inhouse handover notes on lack of movement on their part, both to the Court as well as to their client. They are actually surprised that the Respondent is not taking any adverse against their laxity.

With these observations, I would agree with Respondent’s Counsel that there is indeed inordinate unjustified delay on the part of the Appellant. The appeal herein is dismissed.

Costs to the Respondent.

The Respondent’s Counsel moved this court on 19<sup>th</sup> November 2024 in the course of this case’s management session and submitted that the appeal was inchoate as the assessment thereof was not done. This submission was introduced without any application and Respondent’s Counsel sought the Court’s inherent powers to make an ancillary order that the appeal was inchoate following the jurisprudence of the

court on the subject matter in times recent. This court is reluctant to make a ruling on this submission by Respondent's Counsel. This Court is a Court of Order. There are practices and procedures to wit Counsel is aware of introducing a subject to Court to wit the Applicant seeks the Court's intervention. It is against the background of procedural orderliness that I will not entertain nor make a determination to the application that has been made in the course of case management.

Pronounced this 29<sup>th</sup> Day of November 2024 at Blantyre.



**LADY JUSTICE IVY C KAMANGA SC**

**JUSTICE OF APPEAL**