



IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 70 OF 2009

(Being High Court Comm. Case No. 156 of 2009)

BETWEEN:

V. D. CHIDZANKUFA t/a V & C DISTRIBUTORS.....APPELLANT

- and -

NEDBANK MALAWI LIMITED.....RESPONDENT

CORAM: THE HON. JUSTICE TEMBO, SC, JA

Chokhotho, Counsel for the Appellant
Kasambara (absent), Counsel for the Respondent
Balakasi, Official Interpreter
Singano (Mrs), Senior Personal Secretary

RULING

TEMBO, SC, JA

This is an inter-partes application for stay of execution pending appeal. It has been made by the appellant pursuant to Order 59 Rule 13 of the Rules of the Supreme Court, upon lodging of his notice of appeal, before this court. The appellant has raised the following grounds of appeal, namely, that the learned Judge erred in law; (a) by failing to consider delay as a factor weighing against the granting of an order of a specific performance; (b) by failing to consider that there were no terms of the charge for which specific performance could be granted; (c) by ordering that the terms of the charge to be entered between the parties must be determined by the respondent when in the normal course of

events a charge is entered subject to the agreement of the parties; (d) by failing to consider the facts that the respondent has dirty hands in that they are failing to fully account for the trucks which they seized from the appellant and that the sell of trucks was done in bad faith before granting the equitable relief; and (e) by ordering the respondent to prepare a mortgage deed on its own terms when the same was not pleaded by either party. It is also the contention of the appellant that the decision of the Commercial Court is against the weight of the evidence.

The respondent in the instant case sought the following orders from the Commercial Court, namely: (a) an order for specific performance requiring the appellant to execute a mortgage deed in favour of the respondent; (b) alternatively, an order that the Registrar of the High Court executes the mortgage on behalf of the appellant and that the Deed Registrar registers the said mortgage as if it was executed by the appellant; and (c) further, alternatively, an order that the respondent be at liberty to sell the appellant's property situate at Luchenza Trading Centre registered as Deed No. 80402.

The Commercial Court held the matter on 4th November, 2009, and immediately upon hearing the arguments of the parties, Kapanda, J; pronounced judgment in favour of the respondent. Thus, the learned Judge ordered that the appellant should enter a mortgage deed in favour of the respondent and the mortgage deed be drafted by the respondent. The learned Judge reserved his reasons for the orders orally made to be expressed in a written judgment which would be made on a date to be fixed. The learned Judge then ordered the parties to comply with his order for specific performance within 30 days from 4th November, 2009, thus until 4th December, 2009.

On 5th November, 2009, the appellant made an ex-parte application for stay of execution pending appeal before the Commercial Court, which the court ordered to be heard inter-partes. The respondent did not file affidavit evidence in opposition of the application for stay, although its counsel filed skeleton arguments. On 18th November, 2009, when the Commercial Court heard the appellant's application for stay, counsel for the respondent was absent from court. Upon hearing the appellant on the application, the court reserved its ruling to be delivered, later, on a date to be fixed. Be that as it may, the learned Judge, in doing so, verbally assured counsel in the matter that he would deliver the ruling within the 30 day period within which the parties were required to comply with the order of specific performance.

It is apposite for the court to note that until today, the Commercial Court has not yet made its formal written judgment in the matter and it has not yet made any ruling on the appellant's application for stay. As

per the applicable rules, an application for stay of execution made before this court is not made by way of appeal against any refusal of a similar application made before the High Court. A party is at liberty to make an application therefor before this court after first having done so at the court of first instance. The jurisdiction is concurrently exercised by the High Court and this court.

The instant inter-partes application was made on 9th December, 2009. A notice of adjournment for the hearing of the application today was dully served on and acknowledged by learned counsel for the respondent on 14th day of January, 2010. Besides, before the court resolved to proceed with the hearing of the application in the presence of counsel for the appellants only, the Court Clerk sought confirmation by phone from and if Mr. Kasambara, counsel for the respondent, was ready and willing to attend the hearing as scheduled and notified. Mr. Kasambara gave his assurance that he would attend the hearing. Be that as it may, Mr. Kasambara did not show up for the hearing, which was originally scheduled for 9:00 am until 9:50 am when the court resolved to proceed with the hearing in his absence.

Consequent upon the High Court decision, now appealed against, the respondent has prepared a mortgage deed backdated to the year 2005 at 4% above the base lending rate. The mortgage deed makes the debt payable on demand without any repayment schedule which, in the view of the appellant, means that upon its execution the respondent can immediately demand the whole of the sum due. It is also the view of the appellant that if he refuses he would be held to be in contempt of the court and that the execution of the mortgage deed now would render the appeal nugatory.

The property of the appellant over which the respondent wants the appellant to create the mortgage is residential premises. It is the one and only home where the appellant and his family reside. If it is sold pending the hearing of the appeal, the appellant and his family will be ruined. It is therefore the view of the appellant that if the property is sold under the terms of the proposed mortgage, which gives the respondent the power to sell at any time, the appellant and his family will have nowhere else to stay. Besides, if the appellant succeeds in his appeal, the house, to which the appellant and his family are sentimentally attached, will not be given back to them. On the other hand, there is no risk on the part of the respondent of losing its security in that the appellant would not sell the property prior to the hearing and determination of the instant appeal given the inhibition order of the High Court dated 14th August, 2009. Besides, the property is worth several fold in excess of or beyond the alleged debt in the instant case.

Reverting to the applicable law, the position is as follows:-

The grant or refusal of the stay is a discretionary matter for the court: **AG v Emerson** (1889), 24 Q.B.D., pp 58, 59. The court will grant a stay where the special circumstances of the case so require: **Tembo v Industrial Development Group** [1993] 16 (2) MLR 878. Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success: **Linotype-Hell Finance Ltd v Baker** [1992], 4 All ER p. 887. In **Federal Commissioner of Taxation v Myer Emporium Ltd** (No.1) (1986) 160 C.L.R. 220, at pp. 222-3 Dawson J said:

*“It is well established by authority that the discretion which it confers to order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal: see e.g. The **Annot Lyle** (1886) 11 P.D. 114, at p. 116; **Searborough v Lew’s Junction Stores Pty. Ltd** [1993] V.R. 129, at p. 130. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory: see **Wilson v Church** (No. 2) (1879) 12 Ch. D. 454, at p.458; **Klinker Knitting Mills Pty. Ltd. v L’Union Fire Accident and General Insurance Co. Ltd.** (1937) V.L.R. 142. Generally that will occur when, because of the respondent’s financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed: see **McBride v Sandland** (No.3) (1918) 25 C.L.R. 369, at p. 375.”*

Regard being had to the foregoing position at law, would the circumstances of the instant application merit a grant of the appellant’s application? It is expedient to note the following facts: the court has not had occasion to peruse the judgment of the lower court now appealed against given the fact that the learned Judge has not yet prepared and made his formal written judgment in the matter. However, a glance at the notice of appeal clearly shows that the appellant is raising substantial grounds against such decision which may render the appeal to be successful. The appellant has substantially shown that if his

appeal becomes successful, it will not be possible for the appellant to be restored substantially to his former position if the judgment against him is executed now, in that once the house is sold it would not be given back to him. In addition, the appellant has shown that without a stay of execution the appellant and his family will be ruined. Besides, the mortgaged property is of high economic value and that there is an inhibition order against the appellant, which restrains him from disposing or like wise dealing with the property.

It is therefore the considered view of the court that the appellant has successfully demonstrated that there are special circumstances in the instant case which would justify a grant of an order for stay of execution. The order to be valid until the determination of the appeal before the court. It is so ordered. Costs in the cause.

MADE in Chambers this 20th day of January, 2010 at Blantyre.



A.K. Tembo, SC

JUSTICE OF APPEAL