Mary Nkolokosa & 18 Others v Banja La Mtsogolo Limited

Judgment

Court:	Industrial Relations Court
Bench:	Peter M.E Kandulu, Deputy Chairperson
Cause Number:	Matter No. IRC 456 of 2017
Date of Judgment:	February 27, 2024
Bar:	Chance Gondwe, Counsel for the Applicants. Maziko Sauti Phiri, Counsel for the Respondent.

RULING ON AN ORDER ASIDE ORDER DATED 12TH JANUARY 2024 OBTAINED EXPARTE SETTING ASIDE AN ORDER OF STAY DATED 26TH JULY 2021

Introduction

Before the court, there is an application to set aside an order dated 12th day of January 2024 obtained exparte setting an order of stay dated 26th July 2021. Attached to the application is an affidavit in support of the application. There is a sworn statement sworn in by Counsel Maziko Sauti Phiri.

Holding

The motion is dismissed with cost. The reason was that the counsel who filed the motion did not mention any law or rule in this motion. Since the motion was filed without any citation of the rule of law, the court considered the motion as vexatious and a waste of the Court's precious time.

Brief Facts

Briefly, counsel states that he got a phone call on Wednesday 17th January 2014 (2024) from Ms. Dumi Mwenitete, who is a Corporate Services Director, at Banja La Mtsogolo Limited (BLM) that sheriffs were at BLM clinic in Blantyre enforcing the Mary Nkolokosa Claim (Mary Nkolokosa).

He requested a copy of the warrant of execution, which was sent to him together with an affidavit sworn by Counsel Chance Gondwe. He states that he observed that Counsel Gondwe informed the court that there is some correspondence from BLM to the Court, but he does not disclose its nature or character. He also failed to attach copies for the court to appreciate for itself the chronology and nature of the correspondence.

The correspondence he refers to are letters sent by him to the court reminding the court to prepare and finalise a record of appeal. The first such letter of reminder is dated **17th December 2021** and the last is **7th March 2023**. The

copies of those letters were exhibited and marked. The letters were served on Counsel Gondwe to inform him that BLM is doing its best to push the appeal to take place.

Counsel Gondwe omits to inform the court that on 13th August 2021, BLM paid a sum of MK22, 345,828.00 into court. The Notice of payment into court was served on Counsel Gondwe on 16th August 2021. Notice of payment into court marked was exhibited and receipt was issued on 13th August 2021.

He has been in constant communication with Mr Kelvin Kakhobwe of the IRC on the question of the outstanding Record of Appeal. His latest WhatsApp communication with him was on the 9th day of October 2023. He was asking him what else he needed to do to have the Record of Appeal ready. A printout of the WhatsApp communication was exhibited and marked.

Before that exchange of communication, Mr. Kakhobwe promised him that he would arrange for someone to type the Record of Appeal, but he subsequently **told him that the file could not be located.** In other words, he was informed that the file was missing from the registry. (***Emphasis supplied by me***)

Therefore, it was not true that BLM has not taken any active steps to prosecute the appeal. It has done everything allowed by law to pursue the appeal. **The IRC itself has failed to prepare a Record of Appeal despite his many reminders.** He cited Order XXXIII of the Subordinate Court Rules.

BLM does not want to delay the matter so that it avoids payment. BLM has already paid MK22, 35, 828.00 into Court, and Counsel Gondwe is aware of this payment.

No Rule or Law under which the application or motion is based.

The court must state from the outset that counsel for the Respondent did not cite any law or rule on which the motion to set aside the order of discharge is based. What the court should remind itself is that this court is a court of law and rules. The court does not operate or discharge its mandate out of sympathy. The accompanying rules and laws usually guide the court when it is faced with a motion or an application of this nature. It is not the duty of the court to find the appropriate rule or laws on which the application or a motion is based. Counsel seeking remedies from the court must be vigilant enough among others by citing the law or rule from which his application or motion is premised.

The court is grateful to counsel for the Respondent for the skeletal arguments in support of the application to discharge an order obtained exparte. However, as stated above, counsel cited **NO** rule or law in the introduction paragraph again, on which the motion or an application is premised.

The court noted that counsel has cited ***Vitsitsi v Vitsitsi*** (2002-03) MLR 419 and provided a copy of a precedent that an injunction will be dissolved if the applicant suppresses information which, if before the court, would have

materially affected the determination to grant the injunction or not. The application before this court is a motion to set aside or discharge an order of stay granted to the applicants. There is no issue of an injunction before this court. This means the principle relied on by counsel for the Respondent would be either relevant or not depending on the facts, which were before the MSCA.

The principle in Vitsitsi's case (supra) can be distinguished from the case at hand considering that the motion to set aside or discharge an order of stay could be different from a motion to set aside or discharge an injunction. At hand, the reasons, which were cited by counsel for the applicants, was that the Respondent since 2020 has not prosecuted the appeal. There have been inordinate delays in prosecuting the appeal because the respondent is enjoying the stay, which was granted to stop the execution of the Judgement.

These two applications are two distinct from each other. An injunction is a temporary relief granted either exparte or interparte to a party who moves the court for temporary relief and has a specific period unless made permanent by the court. An order for stay is always granted when there are compelling reasons to stop the execution or enforcement of a judgement. One such reason could be that the respondent or the applicant is dissatisfied with a judgement of the court, they intend to appeal. Based on the grounds for appeal, the court could either grant the stay or refuse it. However, the court must be quick to mention that an order for a stay of the execution of a judgement while waiting for the prosecution of the appeal is not a permanent order.

The question the court would like to ask itself was whether counsel serious when he made this application before this court, which is not supported by any law or rules of the court. This question will be dealt with in the subsequent discussion paragraph.

Suffice to mention that the application or the motion to set aside or discharge an order of stay granted to the applicants is opposed by counsel Gondwe who emphatically stated that his opposition to the motion to discharge an order of stay shall rely on the affidavit in support of their application which they submitted when they moved the court to discharge an order of stay granted in 2021. Counsel argued according to him the circumstances, which compelled the court to grant the order of stay, have not changed to date.

It is now time to refer to the motion and an affidavit in support, which was filed by Counsel Gondwe before the court to discharge an order of stay, which was granted, by the court. Counsel Gondwe stated that this court entered judgement on liability against the respondent. On Assessment of damages, the court assessed part of the damages at MK44, 691, 657. 00 for compensation, severance pay and accrued leave. The respondent is dissatisfied with the determination of the court, filed a Notice of Appeal on the 27th day of February 2020, and subsequently amended on the 11th of February 2021.

Since the Respondent filed a Notice of Appeal, the Respondent has not taken any positive steps to prosecute the appeal except for some correspondence from the Respondent to the court. The respondent has failed to actively take steps in

prosecuting the matter as she is enjoying the order for a stay that was granted by the Court.

When the Respondent applied for the stay of execution, the court granted a partial stay which directed the Respondent to pay half of the assessed sums which were MK22, 345, 828.00 and the same was payable within 7 days. The main argument for the stay was that the Respondent is an NGO which relies on donor funding to run its operations and that it had no funds to pay the assessed sums. The respondent should be ordered to pay the remaining half of the assessed sums, as there is no basis for the continuation of the order for the stay.

A search at the High Court, Civil Division that handles the Appeals from this court has shown that there was no registered Appeal concerning the matter and this was confirmed by the clerk of the civil registry, Mrs. Jessie Chilimampunga. Considering the time that has elapsed since the Notice of Appeal had been filed, it is clear that the Respondent is not interested in pursuing the Appeal. The delay in prosecuting the Appeal is too long and unreasonable. The Applicants ought to be allowed to access half of the assessed sums.

The conduct of the Respondent is tantamount to unreasonably denying the Applicants the fruits of their litigation. The court however is yet to assess damages in the form of gratuity, pension and severance due entitlement. The court is yet to assess those other heads of damages.

The appeal by the Respondent is even inquote as other heads of damages are yet to be assessed by this court. Much as the respondent has a right to appeal and to apply for a stay of execution, the facts of this matter are very clear that the Respondent was just trying to delay the matter and deprive the Applicants of benefitting from the fruits of their successful litigation. Considering the circumstances of this matter, justice will favour an order sustaining the order of stay so that the applicants can assess the balance on the adjudged sum.

In reply to the opposition by the applicants, Counsel Sauti Phiri stated as follows considering the applicant's non-disclosure, the order of stay must be discharged. In the affidavit of Counsel Gondwe, there is no disclosure that the respondent paid into court. Regarding the issue of inquote, the law is clear that no matter would lay for an appeal before the conclusion of the matter likewise the enforcement of the judgement cannot be enforced when the matter has not been finalised.

Counsel for the Respondent had cited several decisions and made an effort to provide copies to the court. He cited the case of ***Fundo Soberato De Angola and Others Vs Jose Filomeno Dos Santos and Others***, Case No CL-2018-000269. In this case, counsel emphasized the principle of Non Disclosure, ***Aeroplastics Industries Limited and Abdul Majid Sattar v The State and the Director of Environment Affairs*** MSCA Civil Appeal No 19 of 2019. The principle in the case captioned is that it is the primary responsibility of the Appellant to prepare the record of the appeal, which shall be certified as correct by the Registrar of the Court below.

I must hasten to mention that when the court discharged the stay granted in 2021, it had looked at the temporary file, which was prepared by counsel for the Applicants. The court was satisfied that counsel had disclosed every information, which was required for the court to be satisfied to discharge the stay granted. The two lawyers are tackling two different issues. Counsel Gondwe made an application to collect the remaining balance, which was not made into court, counsel for the Respondent is tackling the initial payment, which was made in court, and the applicants collected it then. In my view, counsel for the respondent even missed the genesis of the motion of Counsel Gondwe to discharge the stay granted. It is probably because of this misunderstanding that counsel for the respondent even failed to disclose the law or rule premised by his motion.

The Law

16.-(1) An interlocutory application or other application incidental to any proceedings pending before the Court in respect of which no procedure has been provided for by the Act or by these Rules shall be brought by a party on notice of motion which shall, as near as possible, be in the form set out in IRC FORM 3

(2) The applications referred to in sub-rule (1) shall be supported by an affidavit;

Provided that-

(a) Applications as to procedural aspects need not be supported by affidavit; and

(b) Depending on the nature of the application, the Court may dispense with such notice.

65. (1) Subject to subsection (2), decisions of the Industrial Relations Court, shall be final and binding. (Appeals)

(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered.

(3) The lodging of an appeal under subsection (2), shall not stay the execution of an order or award of the Industrial Relations Court unless the Industrial Relations Court or the High Court directs otherwise.

General Powers

25.-(1) without prejudice to the decision-making power of the Court under section 67, the Court may on application or its motion at any time-

(a) Before or after the expiry of any period condone any failure to comply with any rule including periods save for the time within which an appeal may be lodged with the High Court and may abridge at any time prescribed by these Rules;

(b) Allow the allegation in any form to be amended at any time;

(c) If in any proceedings it appears that a party to the proceedings has been incorrectly or defectively cited, correct the error, defect, or order the substitution of the party;

(d) Join any other person as a party to the proceedings at any time on any such terms and conditions as it deems fit;

(e) Make an order consolidating the disputes pending before it in separate proceedings where it deems such consolidation expedient and just;

(f) Allow any party at any time to amend his application or his opposition;

(g) Grant any order in the absence of a party if it is satisfied that the party had notice of the set hearing date;

(h) Rescind on good cause being shown, any order made by it in the absence of a party;

(i) order any person who fails to comply with any notice or directive given in terms of these Rules to do so;

(j) Order that any party who fails to comply with any notice or directive shall not be entitled to any relief in such proceedings;

(k) Set aside any irregular step, which has been taken by another party unless the party complaining of the irregular step has with knowledge of the irregularity taken any further step in the proceedings;

(l) Declare in the case of a partnership or film, that any person was at a certain time or for a certain period a partner of a partnership or the proprietor of a firm;

(m) grant-

(i) Urgent interim relief pending a decision by the Court after a hearing; and

(ii) An interdict or any other order in the case of any action that is prohibited by law regarding any trade dispute;

(n) Before or during a hearing, grant a rule nisi and confirm or discharge a rule nisi on the return date if appropriate unless the Act otherwise provides; and

(o) Preside at any pre-hearing conference.

(2) In any application referred to in sub-rule (1), the Court may make such orders as it deems fit.

(3) The Chairperson or, in his absence, the Deputy Chairperson shall, in his direction, decide when and for how long the Court shall be in recess during any year.

(4) The Court, in the exercise of its powers and discretion and the performance of its functions, may act in such manner as it may consider expedient in the circumstances to achieve the objectives of the Act and in so doing it shall have regard to substance rather than form, save as is otherwise provided in the Act.

Legal Principles for granting a stay

The legal principles, which guide a court when considering an application for a stay of execution of judgment pending appeal are thus very, clear. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of his or her litigation: see ***J.Z.U. Tembo v. Gwenda Chakuamba***, supra, ***Re Annot Lyle*** (1886) 11 PD 114.

The Malawi Supreme Court of Appeal restated this position in ***Dangwa and Another v. Banda*** (1993) and ***Mike Appel & Gatto v. Saulosi Chilima***, (2013) MLR 231, MSCA. Therefore, the fact that a party has exercised his or her right to appeal to a higher Court does not mean that the judgement appealed against must be stayed: see Order 59, rule 13 of RSC.

However, the Court is most likely going to grant a stay where the appeal, if successful, would be rendered nugatory: see ***Wilson v. Church*** (No. 2) (1879) 12 Ch D 454. In ***Press Corporation v Cane Products Limited*** (2005) MLR 377, the court emphasized that the burden to show special circumstances warranting a stay of execution is always on the applicant: see also ***Mhango v. Blantyre Land and Estate Agency Limited*** 10 MLR 55 and ***Barker v. Lavery*** (1885) 14 QBD 769. The applicant therefore needs to demonstrate to the Court that there are special circumstances in favour of granting a stay. Further, a Court will order a stay of execution of a judgement pending appeal when it is satisfied that the applicant would suffer loss, which could not be compensated in damages: See paragraph 59 /13/1 of the RSC.

At the end of the day the question of whether or not to grant a stay is at the discretion of the Court and each case must be assessed on its facts and merits, ***Nyasulu v. Malawi Railways Limited*** [1993] 16{1) MLR 394.

Generally, the Respondent bears the onus to prove that the Applicant will not be able to pay back the damages awarded to it. In ***Anti-corruption Bureau v. Atupele Properties Ltd***, MSCA Appeal Case No. 27 of 2005 {1 February 2007), Tambala JA (Rtd), made the following pertinent observations:

"*First it [stay of execution] is within the discretion of the Court. Secondly, the general rule is that the Court shall not interfere with the right of a successful party to enjoy the fruits of litigation. Third, where a respondent would be unable to pay back the money then a stay may be justified. Lastly, the court would still*

have discretion to refuse a stay even where the respondent is impecunious if the stay would be utterly unjust and oppressive."

The bottom line is that the applicant must demonstrate that the respondent falls within the exceptions. It is not for the respondent to demonstrate the capacity to pay back. The duty lies on the applicant to establish the respondent's lack of capacity to pay back."

In ***Davies Lanjesi & Others v. Joshua Chisa Mbele***, HC/PR Civil Cause 1 of 2014 (unreported). Katsala J addressed the issue, on page 6, as follows:

"*All that the defendant has done is to state that he is optimistic that his appeal will succeed as such the judgment must be stayed. He has gone to great lengths to set out his 20 grounds of appeal and the reliefs he expects to get from the Supreme Court of Appeal. These are irrelevant as far as the present application is concerned. Even if he were to state a million grounds of appeal, in my view, it would still be irrelevant and a waste of time, because grounds of appeal are not one of the considerations in an application of this nature. In other words, trying to demonstrate that the judgment appealed against is full of rubbish and will be reversed on appeal is pointless and a clear demonstration of a lack of knowledge of the principles governing the application. As was said in the Chidzankufa case {supra) at 182: the answer to the Plaintiff's argument. The fact that there are prospects of the appeal succeeding is not a ground upon which a stay can be granted. The words of Chatsika J, as he then was, in Nyirenda v AR Osman [1993] 16(1) MLR 400 at 403, readily come to mind. 'A judgment of a Court of competent jurisdiction remains enforceable even though there are good grounds*

that an appeal against the judgment will be successful. '

Reasoned Analysis of the Facts and the Law

There is a motion to set aside or discharge an order of stay, which was granted to the applicants. As stated earlier on, the motion is not supported by any law cited by counsel for the Respondent. Suffice to mention that Rule 25 (k) provides a procedure on how the court can set aside any irregular step, which has been taken by another party unless the party complaining of the irregular step has with knowledge of the irregularity taken any further step in the proceedings.

As already stated, the court delivered its judgement against the Respondent on the 10th day of January 2020. Following the said judgement on liability there was a court proceeding on partial assessment of damages. The court awarded the applicants MK44, 691, 657. 00 as compensation for unfair dismissal, severance pay and accrued leave. The said judgement was delivered on the 9th day of February 2021.

Dissatisfied with the awarded sum, the Respondent filed a notice of appeal as well as a motion to stay the execution of the judgement. The court granted the stay of the judgement on the assessment of compensation on condition that the Respondent must pay half of the assessed sum to the Applicants. The said judgement to stay the execution of the judgement was granted on the 26th day of July 2021.

Since the 26th day of July 2021, the Respondent has not prosecuted the appeal to date 2 years and 7 months have elapsed since the notice of appeal was filed. The Respondent had not prosecuted the appeal for all these years. Considering that time was lapsing the applicants took an active step to crosscheck with the High Principal, Civil Division whether the Appeal was before any of their courts. The Applicants through their lawyer were informed that there was no such an appeal in the High Court. The applicants moved this court to discharge the said order for stay and allow them access to the remaining half, which was unpaid to date. The said order to discharge the stay was granted and the applicants executed the judgement remaining sum through the sheriff of Malawi.

Aggrieved with execution, the Respondent had filed the motion to have the order to discharge the order of stay discharged. As I had already stated earlier any law or rule in which the motion was premised does not support the said motion. However, the court has been so generous enough, that it went to look for the applicable law, which would deal with this application on its own. The said rule is Rule 25 (K).

Having looked at the law itself, I find no compelling justification to sustain the stay of the execution of the judgement. The respondent in my view had failed to prosecute the appeal. The judgement was delivered in 2020. Three years have lapsed and the appeal is not prosecuted. The excuse by counsel for the Respondent that he had been reminding the court whether the file had been transmitted to the High Court is lame.

The Court must state that this DCP sitting in this case was appointed the Assistant Registrar of the Industrial Relations Court in 2022. Counsel for the Respondent had never approached his office or rather came to his office of the AR then to complain that the record for this case had not been transmitted to the High Court.

It is more so shocking to hear and learn for the first time during this court sitting that the file in question, was reported, it could not be located in the registry. This shocking but crucial information was never brought to the attention of the AR then by counsel. In my view, by failing to bring this information to the office of the AR then, the respondent felt satisfied with the stay, which was granted to deny the litigants the hard-won fruits of their litigation. However, the underlining principle or rule when granting a stay is that the Court does not make a practice of depriving a successful litigant of the fruits of his or her litigation: see ***J.Z.U. Tembo v. Gwenda Chakuamba***, supra, ***Re Annot Lyle*** (1886) 11 PD 114.

The court is persuaded to lean towards the applicants considering if the information stated in the affidavit of counsel is true that counsel for the Respondent wrote the Registry in 2021 and the reminder was written in 2023. How would we say the respondent was desirous and serious about prosecuting the matter? When they had remained passive for 2 years when the file had not yet been transmitted to the High Court?

The Respondent did not take any active/positive steps to meet with the Assistant Registrar and then to launch a complaint about the information they had

received from the clerk that the file could not be located in the Registry.

In my, if the office of the Assistant Registrar then was approached, he could have facilitated the opening of a duplicate or temporary file to prepare the record for appeal. Without the knowledge of the Assistant Registrar that the file could not be located in the registry, he could not have dreamt that there was a problem with the preparation of the record for appeal.

The court had followed with **Keen Interest** that Counsel was more interested in engaging the clerk on what could have been done to have the record prepared without passing through the office of the Assistant Registrar who is the head of the Registry.

The Court had made inquiries from Mr Kelvin Kakhobwe on what he knew about the file and record in question. Mr Kakhobwe has told the court that after the delivery of the Judgement, and after the payment of half of the compensation as ordered by the court, the Respondent did not do anything at all.

It is his explanation, He told the court that counsel for the respondent only approached him last year. He told Counsel that if the file was not transmitted to the High Court for appeal, it could be possible that with time, the file was taken to the archives. The file is taken to the archives when there are no positive steps taken by either the applicant or the respondent for further direction.

In essence, Mr. Kakhobwe had told the court that he did not receive any communication in the form of a letter of reminder regarding the record of the court from the Respondent. He only received WhatsApp communication from counsel regarding the record last year. He categorically stated that there were no active steps, which were taken by counsel for the Respondent to have the file or record ready for an appeal.

In my analysis, it appears that counsel for the Respondent was interested in issuing instructions to the clerk of the court on what to do for the preparation of the record of appeal. This was the more reason when he was informed that the file could not be located in the registry, counsel remained mum instead of approaching the office of the Assistant Registrar for proper instruction and direction on what could have been the best way forward to have a copy of the record ready.

The court is compelled to agree with counsel for the Applicants that the Respondent is only aiming at frustrating the fruits of the successful litigants when he filed the motion for an order to restore the order to stay the execution of the judgement.

It is trite that only the final order of the judgement of the court is the one amendable for appeal at the High Court. It is surprising to see how my brother granted a stay of the execution of the judgement and allowed counsel for the

Respondent to file an appeal on a judgement, which was not final. It is with this in my mind that this court shall sustain the discharge of the order of stay, which was granted in 2021.

The Industrial Relations Court would only award costs to a successful litigant in special circumstances. This is a special case where the court would exercise its discretion to award costs to the Applicants. I find that the motions to discharge an order to vacate the stay of the execution of the judgement have no basis in law as there is no law which has been cited by Counsel for the Respondent to warrant such a discharge. The motion itself lacks merit and is a waste of court time. It is only based on a finding that I award costs to the applicants. The motion is dismissed in its entirety.

Delivered in chambers this 27th day of February 2024 at Blantyre.