IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CAUSE NUMBER 44 OF 2014

BETWEEN:

THE STATE

AND

THE MALAWI REVENUE AUTHORITY **RESPONDENT**

AND

EX PARTE

IMRAN MEMAN t/a KAMLISHA ENTERPRISES AND OTHERS

APPLICANTS

Coram: JUSTICE M.A. TEMBO

Mbeta, Counsel for the Applicants

Likomwa, Counsel for the Respondent

ORDER

This is this Court's order on the applicants' application for leave to appeal against an order of this Court discharging leave obtained by the applicants to apply for judicial review in this matter and for an order of stay of the decision of this Court discharging the leave to apply for judicial review and vacating an order staying

implementation of respondent's decision sought to be reviewed herein. On the respondent's application, on 29th July 2014 this Court granted an order discharging leave to apply for judicial review and vacating an order of stay obtained by the applicants herein with respect to the respondent's decision made on 6th March 2014 to implement mandatory use of Electronic Fiscal Devices for VAT starting 1st July 2014. The reasons for the discharge of the leave and stay order were that the applicants not did not promptly apply for leave to move for judicial review but also failed to apply for judicial review within three months of the respondent's decision complained about in this matter. Additionally, this Court found that the applicants took advantage of the ex parte procedure on leave to apply for judicial review, and in breach of their duty to make a full and frank disclosure of facts, by making gross misrepresentations of fact in this matter which misled the Court to grant leave to apply for judicial review.

The applicants now seek leave to appeal against the decision of this Court discharging leave to apply for judicial review and vacating the order of stay. The applicants further seek an order of stay of this Court's decision discharging leave to apply for judicial review and vacating the order of stay.

The applicants apply for leave to appeal to the Malawi Supreme Court of Appeal under section 21of the Supreme Court of Appeal Act. The applicants contended that the granting of leave to appeal is automatic and it is unheard for such leave to be declined. Before proceeding any further this Court wishes to state categorically that leave to appeal from a decision of the High Court to the Supreme Court has ever been declined. Whether leave to appeal is merited requires probing. A clear example can be found in the case of *Tembo and others v Republic (2)* [1995] 2 MLR 778 (HC). The reason advanced by the applicants that leave to appeal has to be automatically granted is that the applicants have not finished the whole ladder of the court appeal process since this Court is only a court of first instance. The respondent opposed the application for leave to appeal.

The respondent argued that section 21 Supreme Court of Appeal Act requires the application for leave to appeal to be supported by affidavit. Further, that it is in the affidavit that the applicants were supposed to state the reasons for seeking leave to appeal. The respondent stated that Justice Mwaungulu, as he then was, in the matter involving the *MRA and the Estate of Bingu wa Mutharika* directed that on

an application for leave to appeal against a judicial review decision such an application ought to meet a test of whether there's a likelihood of success of the appeal. The respondent indicated that it is waiting for a written decision on that matter. Consequently, a copy of that direction could not be made available to this Court.

The respondent further argued that the applicants' application for leave to appeal does not meet the standard as required in section 21 Supreme Court of Appeal Act. The applicants replied that the Supreme Court of Appeal Act does not say anything about an affidavit to support an application for leave to appeal. Further, that the starting point is that an appeal shall lie to the Supreme Court of Appeal against the decision of this Court as long as the ladder of courts has not been exhausted in litigation. The applicants argued that the direction given by Justice Mwaungulu, as he then was, as submitted by the respondent, was merely a direction and not a statutory provision or a rule of court. Further, that the reasons for the said direction have not been made available to this Court. The applicants then submitted that the application for leave to appeal shall be ex parte by motion in terms of Rule 3 rr 3 Supreme Court of Appeal Rules and not by affidavit. Further, that the instant application as is being considered inter partes was in a superior form. The applicants also contended against this Court discussing the likelihood of the appeal as doing so would result in this Court discussing the merits of its own decision which is discouraged by various decisions such as the decision of the High Court in the case of *Sattar v the Liquidator of Clathian Investments Limited* civil cause number 93 of 2014 (High Court) (unreported). This Court observes outright that that decision is about applications of stay and has nothing to do with an application for leave to appeal.

This Court agrees with the applicants that in the absence of a written decision it would be difficult for this Court to fully and properly consider the direction made by Justice Mwaungulu, as he then was, on the aspect alluded to by the respondent with respect to the decision in the case *MRA and the Estate of Bingu wa Mutharika*.

In dealing with the matter at hand, it would be prudent to reproduce the relevant provisions governing applications for leave to appeal from a High Court decision at chambers to the Malawi Supreme Court of Appeal. The Constitution does not

make any provision guaranteeing a right of appeal in civil matters. Statutes regulate such matters. It is only in criminal matters that the accused person is guaranteed an automatic right to appeal against the decision of the court of first instance. That is provided in section 42 (2) (i) (*viii*) which provides for an accused person's right to have recourse by way of appeal or review to a higher court than the court of first instance as part of the right to a fair trial. It is therefore to the relevant statute that we must specifically turn to determine what are the requirements on leave to appeal in civil matters such as the one at hand.

The starting point is section 21 of the Supreme Court of Appeal Act which provides with regard to civil appeals that

> An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:
>
> Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—
>
> (a) an order allowing an extension of time for appealing from a judgment;
>
> (b) an order giving unconditional leave to defend an action;
>
> (c) a judgment which is stated by any written law to be final;
>
> (d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:
>
> And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—
>
> (a) a judgment given by the High Court in exercise of its appellate jurisdiction or on review;
>
> (b) an order of the High Court or any judge thereof made with the consent of the parties or an order as to costs only which by law is left to the discretion of the High Court;
>
> (c) an order made in chambers by a judge of the High Court;

(d) an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases—

(i) where the liberty of the subject or the custody of infants is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any contributor or the liability of any director, or other officer, under the Companies Act in respect of misfeasance or otherwise; Cap. 46:03

(iv) in the case of a decree nisi in a matrimonial cause;

(v) in the case of an order on a special case stated under any law relating to arbitration;

(e) an order refusing unconditional leave to defend or granting such leave conditionally.

Order III rule 3 Supreme Court of Appeal Rules provide as follows on leave to appeal

(1) Where an appeal lies only by leave of the Court or of the Court below any application to the Court for such leave shall be made ex parte by notice of motion. Civil Form 2

(2) If leave to appeal is granted by the Court or by the Court below the appellant shall file a notice of appeal:

Provided that nothing in this sub rule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal.

The Civil Form 2 provides the format for seeking leave to appeal. And it is in the following format

IN THE SUPREME COURT OF APPEAL

NOTICE OF MOTION FOR LEAVE TO APPEAL

(ORDER III, RULE 3)

Between ..... Plaintiff

and

..... Defendant

TAKE NOTICE that the Supreme Court of Appeal/High Court will be moved on the ..... day of ..... 19 ..... at ..... o'clock in the forenoon or as soon thereafter as counsel can be heard on the hearing of an application for leave to appeal against the decision of the ..... Court ..... given on the ..... day of ..... 19 .....

And further take notice that the grounds of this application are:—

Dated this ..... day of ..... 19 .....

Applicant or his legal representative

whose address for service is

.....

To:

THE REGISTRAR,

SUPREME COURT OF APPEAL/HIGH COURT

And* .....

Note: An address for service must be given.

From the foregoing the applicants are right, contrary to the assertion by the respondent, in submitting that there is no requirement to file an affidavit on an application for leave to appeal. However, the applicants were supposed to file a notice of motion ex parte. The notice of motion was supposed to indicate the reasons for seeking leave to appeal herein. As it is, the applicants simply asked this Court for leave to appeal. No reasons have been given why leave to appeal should be granted. At the hearing for leave to appeal, at which the respondent was also present to address the applicants' application for stay of the order discharging

leave to apply for judicial review, this Court actually had to prompt the applicants to say more on whether the leave to appeal they were seeking was automatic as they put it by the economy of their address on the same or not. As earlier observed by this Court, clearly the right to appeal in civil matters is not automatic so that leave to appeal will be granted automatically. It is only in criminal matters that the Constitution guarantees the right to appeal. In civil matters the right to appeal is governed by statute. The Supreme Court of Appeal Act in the further proviso to section 21 at (c) requires leave to appeal against a decision of this Court made at chambers before an appeal can be heard by the Malawi Supreme Court of Appeal. Further, it is clear from Order III rule 3 Supreme Court of Appeal Rules that reasons for seeking leave to appeal against a decision of this Court made at chambers must be given for a proper consideration and determination of the application for leave to appeal to be made. And for good reason, because otherwise the Supreme Court of Appeal would be inundated with matters which do not deserve a day in the Supreme Court on account of such matters not raising matters worthy of an appeal hearing. For instance, where the intended appeal does not have any merit at all. The practice in England and Wales under the Rules of Supreme Court also required that reasons for seeking leave to appeal must be stated. See Order 59 rule 14 rr2 Rules of Supreme Court 1965.

The practice of considering what matters should be heard by the highest courts in a jurisdiction is not peculiar to Malawi. The practice obtains in many jurisdictions such that civil matters are not automatically eligible for listing before the highest courts equivalent to the Malawi Supreme Court of Appeal. Matters go through a vetting process to weed out unmerited appeals without taking up too much of the precious time of the highest courts of the land.

Even if the applicants had filed a notice of motion for leave to appeal this Court is of the view that the same would not succeed considering that the applicants on the application for leave to apply for judicial review ex parte clearly breached their duty to make a full and frank disclosure of the facts by making gross misrepresentations of fact that misled the Court to grant the leave ex parte to apply for judicial review. It has been clearly shown, in this Court's order discharging the applicants' leave to apply for judicial review, that had it not been for such gross misrepresentations the leave to apply for judicial review would not have been granted to the applicants. In such circumstances, it would not be right to send the

applicants to the Supreme Court of Appeal by granting them leave to appeal herein.

In view of the foregoing, the respondent is correct that the application for leave to appeal as presented by the applicants herein does not meet the standard required on such an application. No reason having been advanced by the applicants as to why leave to appeal should be granted to appeal against the decision of this Court made at chambers, the applicants' application for leave to appeal against the decision of this Court of 29th July 2014 consequently fails and is declined.

This Court now turns to consider the applicants' application for stay of this Court's decision pending appeal against the same. Obviously, since the applicants' application for leave to appeal has been declined for want of reasons there can be no appeal against the decision of this Court made on 29th July 2014 herein. The reason for seeking the stay order, being the appeal, is therefore unavailable to the applicants. On that ground alone the applicants' application for a stay of this Court's decision of 29th July 2014 fails and is consequently declined.

However, even if this Court granted that the applicants leave to appeal in this matter, the application for stay of this Court decision of 29th July 2014 would still not succeed for the following reasons.

To start with, this Court refers to the considerations on an application for stay of a decision of this Court pending appeal as summarized in the decision of my brother Judge in the case of *Sattar v the Liquidator of Clathian Investments Limited* civil cause number 93 of 2014 (High Court) (unreported) which was rightly cited by the applicants. In that case the Court stated that the general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of litigation. A court would grant an order of stay if there are good reasons for doing so. A court would also order stay of execution pending appeal where it is satisfied that failure to order a stay would render the appeal nugatory. Further, a court would order stay of execution pending appeal when it is satisfied that the appellant would suffer loss which could not be compensated in damages. The Court referred to Note 59/13/1 to Order 59 rule 13 Rules of Supreme Court.

The applicants strongly contended that on an application for stay pending appeal it was not proper to consider the likelihood of the success of the appeal which is the

basis of the stay as that would call the trial court to consider the merits of its own decision.

The applicants contended essentially that there are good reasons for granting an order of stay in this matter. On the other hand, respondent contended that there are no good reasons or exceptional circumstances warranting a stay of the decision of this Court.

The applicants asserted that if the stay of execution is not granted their appeal will be rendered nugatory herein for several reasons. Firstly, that one of the issues that the applicants were pursuing in this matter is the issue of costing of their operations in view of the introduction of the Electronic Fiscal Devices by the respondent. The applicants asserted that their evidence points to the fact that they would have to foot very high expenses on the purchase of the till rolls to use in the Electronic Fiscal Devices and will inevitably have to increase the selling price of their products.

The applicants equally complain about the standard handling fee on repairs of the Electronic Fiscal Devices as another source of expense at K15 000 per each repair episode with the appointed and licenced distributors of the Electronic Fiscal Devices. The applicants state that the Electronic Fiscal Devices puts them at an unequal footing vis a vis non-VAT operators. That loss of business should not be left to be remedied by damages alone and that a stay order is therefore important. The applicants contended that these factors constitute exceptional circumstances justifying an order of stay of the decision of this Court discharging leave and stay of the respondent's decision to implement Electronic Fiscal Devices for VAT. Additionally, the applicants pray that they should be granted a stay order so that they can continue paying VAT and other taxes instead of being squeezed out of business by the respondent's introduction of the Electronic Fiscal Devices.

The respondent argued on the contrary that the applicants are just fearful as none of those involved in the pilot have lost business at all. Further, that there was no evidence to show that the Electronic Fiscal Devices would cause businesses to incur very high costs with regard to the thermal till roll that is more expensive than the ordinary receipts used by the applicants. One of the deponents Mr Rashid took part in the piloting of the Electronic Fiscal Devices and the respondent says he

never had to suffer exorbitant maintenance costs. The applicants replied by stating that Mr Rashid one of those who piloted on the Electronic Fiscal Devices has had to move from using a receipt costing K4 per receipt to one costing K20 per receipt under the Electronic Fiscal Devices regime. It was said that would reduce profits in his cement business.

This Court wishes to point out that the deponents on behalf of the applicants provided contradictory evidence in this matter. Some of the deponents said they were fearful about the operation of the Electronic Fiscal Devices but had no actual proof of what they feared for example that the Electronic Fiscal Devices would not transmit data to the respondent's servers due to network problems on the part of service providers TNM and Airtel. Yet some of the deponents for the applicants in their evidence said that during the piloting of the Electronic Fiscal Devices none of such feared problems were experienced. This shows that mostly the applicants are driven by unsubstantiated fears that they will suffer in their businesses due to the Electronic Fiscal Devices.

The other issue about the cost of operations associated with the Electronic Fiscal Devices is about operational costs. One deponent for the applicants, Mr Rashid, said that he was previously using a receipt costing K4 but now with the Electronic Fiscal Devices the receipt to be used is a thermal specially designed receipt that has security features and cost K20 per receipt. There is however no proof given in evidence that K20 is the correct price per receipt. It would equally be an exaggeration.

The applicants state that considering that the majority of their fellow traders are not VAT operators and will not be required to use the Electronic Fiscal Devices the applicants will lose their business to those non-VAT traders. The extent of the loss is said to be unquantifiable. The respondent replied that since the applicants have records of business it can easily be shown if the Electronic Fiscal Devices causes them to lose business but there is no evidence of that at all and all there is are fears.

The respondent further argued that VAT operators will not be at a disadvantage given that the Electronic Fiscal Devices is being rolled out in phases and will eventually cover all business. The phasing is aimed at ensuring smooth

management of the roll out process. The applicants replied that it is not known when the roll out will cover all businesses.

On the issue of phasing of the implementation of the Electronic Fiscal Devices this Court is convinced that the same is true as the current implementation is indeed just a phase and the roll out of the Electronic Fiscal Devices is on-going. This means that at the end of the day all businesses will be covered by the Electronic Fiscal Devices regime for VAT. The fear that there will be non-VAT operators that will have a continued advantage is therefore exaggerated on the part of the applicants. The applicants fear that they will be forced out of business due to the Electronic Fiscal Devices regime for VAT is therefore a tad exaggerated. In any event VAT is supposed to be paid by customers and obviously costs associated with the same will be passed on to consumers. When all the phases of the roll out of the Electronic Fiscal Devices for VAT are done the business community will have parity and no issue will arise of a VAT operator being pushed out of business.

On a different note, the respondent contended that the applicant's application for stay is intended to retain the status quo before this Court's order discharging leave and order of stay of the respondent's decision initially obtained by the applicants. The applicants rightly replied that indeed if this Court stays its own decision the status quo would be retained but that that is not reason enough why this Court should not entertain the applicants' application for stay of this Court's decision.

The respondent charged that the applicants initially sought to challenge the Electronic Fiscal Devices on account of irregularities and frustrations it will bring to business but now shift to say it will cause loss of business. The applicants rightly replied that the considerations on a stay application may not be the same as considerations on the application for leave to apply for judicial review. This Court agrees that considerations on leave and on application for stay may not be identical.

The respondent claims that it stands to lose from the investment it made with respect to the Electronic Fiscal Devices if the order of stay is granted to the applicants. The applicants stated that they are not mere spectators in the tax system but do pay many types of taxes and they need protection too despite the level of investment made by the respondent herein. This Court agrees with the applicants

that matters in issue herein need critical examination regardless of the level of investment by the respondent.

On the whole of the circumstances of this case, this Court is not convinced that the applicants' business will be killed due to the introduction of the Electronic Fiscal Devices for VAT by the respondent. Consequently, the applicants' application for stay is declined with costs to the respondent.

Made in chambers at Blantyre this 8th August 2014.

M.A. Tembo

JUDGE