



JUDICIARY

IN THE SUPREME COURT OF APPEAL

MSCA Civil Appeal No 61 of 2016

THE STATE

VERSUS

THE COMMISSIONER GENERAL OF THE
MALAWI REVENUE AUTHORITY

EX PARTE

AIRTEL MALAWI LIMITED

CORAM: D F Mwaungulu, JA

Sauti Phiri, Counsel for the Appellant

Chungu, Counsel for the Respondent

Chintande, Recording Officer

Mwaungulu, JA

JUDGMENT

Introduction

Airtel Malawi Ltd, the appellant and applicant, comes to this court under Order 1, rule 18 of the Supreme Court of Appeal Rules for stay, *stricti sensu*, of an order or decision under Part 52.7 of the Civil Procedure Rules 1998. Airtel Malawi Ltd, after appealing, applied and the court below refused an application for stay pending appeal. Airtel Malawi Ltd applies, under section 7 of the Supreme Court of Appeal Act, to a single member of this Court for stay of execution pending appeal. This, as both counsel submit and, correctly, in my judgment, is not an appeal. It is a rehearing. Consequently, due weight will be given, after review of all that was before the court below, to the decision of the court below.

Background

The application for stay pending appeal arises from the following events. Airtel Malawi commenced judicial review proceedings against the Commissioner General. The court below, after a full hearing, in a judgment delivered on 26 July 2016, dismissed the motion for judicial review. First, the court below reasoned that Airtel Malawi Ltd could not, in the face of alternative remedies, have the prerogative remedies. The court below dismissed the motion for many reasons, the chief ones captured in this statement in the decision:

It is trite law that the remedy of judicial review is not available in cases where other remedies exist and have not been used, , such as an appeal procedure to the superior court or statutory appellate tribunal or recourse to another forum: see *R v Epping and Harrow General Commissioners ex p Goldstraw*, [1983] 3 All E R 257, at 262. This proposition of the law is premised on the fact that judicial review is a remedy of last resort. It is, therefore, important that the judicial review process should not be clogged with unnecessary cases, that is, cases which are perfectly capable of being dealt with by other tribunals. In this regard, I wish to deal with the issue of alternative remedies first because if it turns out that the applicant has alternative remedies which it has not utilized or exhausted, then it would not be necessary, in my view, to consider other matters.

The lower court concluded this way even though Airtel Malawi Ltd, in demonstrating that it, had tried the alternative remedies, submitted:

The rule the judicial review will not be granted if there is an alternative remedy, comports that the alternative should not just exist on paper, but must be available and accessible in practice. At any rate, the law has always accepted that this is a general rule. In exceptional cases, an applicant may be allowed to pursue judicial review even though an alternative remedy has not been exhausted. Kenyatta Nyirenda J has approved in *State v Commissioner General of Malawi Revenue Authority ex parte Shadrack Namalomba* Judicial Review Case No 22 of 2015 (unreported) the statement made by Lord Scarman in *Re Preston* (1985) AC 835 that in exceptional circumstances the existence of an alternative remedy is not fatal. Justice Nyirenda quotes Glidewell LF in *R v Hallstrom exp W* [1985] 3 All ER 775 who outlined some of the factors to be considered whether the exception should apply. These include: whether the alternative remedy would resolve the question in issue fully; whether the alternative remedy would be quicker.

Applicable rules

There are a few matters from the lower court's decision on stay that should be determined before deciding whether this court should exercise its discretion differently. The court below should not have considered the application based on the Rules of the Supreme Court, 1965. At the filing of the notice of appeal, in so far as Airtel Malawi Ltd sought stay pending appeal, it is the rules of this court, namely, the Supreme Court of Appeal Rules, 1964, that applied. Consequently, under section 8 (b) of the Supreme Court Act and Order 3, rule 34 of the Supreme Court of Appeal Rules, the Civil Procedure Rules, 1998, and all laws applicable in the Court of Appeal in England (and Wales) are default rules and laws of practice of this Court. Moreover, this Court has stated many times that the Civil Procedure Rules, 1998 are the rules of court in the High Court. When Airtel Malawi filed, under Order 3, rule 2 of the Supreme Court of Appeal Rules, the notice of Appeal in the court below, because of Order 3, rule 5 and Order

3, rule 19, the rules applicable to the application were, under section 8 (b) of the Supreme Court of Appeal Act and Order 3, rule 34 of the Supreme Court of Appeal Rules, not the Supreme Court of Appeal Rules, 1964, but the law, practice and procedure in the Court of Appeals in England (and Wales) at that time; these are the Civil Procedure Rules 1998.

The application should have been just for stay

This is important because the court below proceeded on that Airtel was applying for stay of execution of a judgment. The lower court, therefore, ruled that there was no judgment to appeal against. Airtel Malawi Ltd makes a similar application before this court and, curiously, under Order 59, rule 13 of the Rules of the Supreme Court, 1965, UK. There is a distinction between stay of execution of a writ of fieri facias under SC Order 47 of the Civil Procedure Rules 1998 or other modes of enforcing judgment and stay, under rule 52.7 of the Civil Procedure Rules, of an order or decision. Under the former, there is indeed a judgment which is the basis of execution. It is not so for a stay pending appeal.

The stay is for an order or decision

Even in the repealed Order 59, rule 13 of the Rules of the Supreme Court 1965, the sense was not lost:

Except so far as the court below or the Court of Appeal or a single judge may otherwise direct-

- (a) An appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;
- (b) No intermediate act or proceedings shall be invalidated by an appeal

The marginal notes or title of the rule was 'stay of execution.' Even then it is quite clear from the wording that it is a stay of execution or proceedings that are subject of the power. There is no reference to a judgment in the repealed Order 59, rule 13 of the Rules of the Supreme Court. The rule, therefore, should not have been restricted, as the lower court did, to a judgment. That has been clarified now under Rule 52.7 of the Civil Procedure Rules and the title or marginal notes now just refer to it as stay, without the words execution:

Unless -

- (a) The appeal court or the lower court orders otherwise; or
- (b) The appeal is from the Immigration Appeal Tribunal,

An appeal shall not operate as a stay of any order or decision of the lower court.

In the substantive provision, the stay is for 'an order' or 'decision'. Unlike English law, our legislation does not define the word 'order.' Under English rules of court an 'order' includes a 'judgment.' Under our law the word 'judgment' includes an 'order.'

This distinction may be important because of what the lower court actually said. The Court below starts by quoting paragraph 4 - 10 of the appellant's affidavit in support of the application. The material paragraphs, however, are paragraph 7 -10 :

[THAT on 9th June 2015 the Special Tax Arbitrator ruled, albeit erroneously, that there are no arbitration proceedings before her because the Respondent has failed to file a Reply in accordance with the Rules of Procedure for Appeal under the Eight Schedule to the Taxation Act. I attach here to copy of the Ruling which is marked SP2.

[THAT the consequence of the Ruling of 9th June 2015 is that the Applicant's alternative remedy of appeal pursuant to and in accordance with the Rules of Procedure for appeals has virtually shut...]

[THAT the Applicant has filed a notice of appeal against the Ruling of 9th June 2015]

[THAT until the Ruling of 9th June 2015 is reversed on appeal the Applicant is unable to pursue its appeal against the tax assessment made by the Respondent

The Court below then continued as follows:

I have read the six cases that have been cited by the applicant ... In the first five cases, the applicants had not resorted to the alternative mechanisms at all. With respect to *State v Commissioner General of Malawi Revenue Authority ex parte Banja La Mtsogolo Ltd*, there is no evidence before this Court showing that, following the Applicant filing its notice of appeal against the Ruling of 9th June 2015, the Respondent or any other public authority has frustrated the appeal process.. All in all, it is my finding that the Applicant prematurely sought relief from this Court before fully exhausting the appeal procedures provided under the tax laws. In the premises, the Originating Motion that the Applicant took out for judicial review herein is dismissed with costs.

The court below refused stay because in, its reasoning, the appeal was misconceived. The misconception was that, in its dismissal of the motion for judicial review, there was no judgment or, rather, the judgment was on a procedural matter. The attitude of the court below should not, as it was, have been that because there is no judgment the appeal or the stay was misconceived.

First, an order, whether on a procedural or substantive matter, creates a right or entitlement. In *Polin v Gray* (1879)12 Ch. D. 438, 446, Lord Cotton shows how to avoid wording and to go to the substance of the matter:

I see no difference in principle between staying the distribution of a fund to which the Court has held the Plaintiff not to be entitled, and staying the execution of an order by which the Court has decided the Plaintiff is entitled to a fund. In that case, as in this case, the Court, pending an appeal to the House of Lord, suspends what it has declared to be the right of one of the litigant parties.

It is the right or entitlement that is sought to be stayed. In *The Registered Trustees of the Ahmadiyya & ors v The Registered Trustees of the Ahmadiyya*, Idigbe, JSC, said:

I find considerable support for this view in that portion of the judgment of Cotton, L.J. in *Polini vs. Gray* (Ibidem at p.446) which I set out earlier between the marginal capital letters "K"- "L" and "N"- "O". As the learned Judge said, there is "no difference in principle between staying the distribution of a fund to which the court has held the plaintiff not to be entitled, and staying the execution of an order by which the court has decided that a plaintiff is entitled."

In judicial review proceedings, refusal of permission or dismissal of a motion for judicial review entails that the public authority can proceed with the course of action the citizen objects to. In a way, it suggests that the public authority is entitled to proceed with the course of action. The citizen must be able to go to that court and ask for a stay, even though there is no appeal and, for good reasons, the court that granted the leave or dismissed the motion for review may stay, for some time or on condition, implementation of what was objected to. Where there is an appeal, therefore, the citizen must be able to apply for stay of such an order because, by the refusal, the public authority has an entitlement that may be stayed because of the appeal. It was not really for the court below to determine that the appeal was misconceived. If the lower court meant by the suggestion that the appeal was misconceived that there was no serious matter for the appeal, that is a matter that was not fully canvassed and, from the judgment, the court below, despite the appellant's counsel citing a case which the judge decided, proceeded on that a court has no discretion at all where the applicant in a judicial review has not actually exhausted other avenues of redress. This, however, is because in considering the question of stay counsel never brought to the attention of the court some decisions of the court below and this court to the effect that whether to stay orders or decisions pending an appeal depends on balance of convenience or justice.

As stated earlier, the rejection of the leave based on that there was no judgment was because Order 59, rule 4 of the Rules of the Supreme Court, 1965, was not fully appreciated. There is no requirement that stay bases on there being a judgment or order. The stay is for execution or proceedings. Order 52.7 of the Civil Procedure Rules now clarifies the uncertainty, if there was any. The stay can be for an order, which includes, *et alia*, a judgment. There are many things, in addition to a judgment, that may be stayed pending appeal. Order 52.7 of the Civil Procedure Rules 1998 provides for stay of a decision. In this case, the lower court's dismissal of the motion for judicial review was a decision; it was also an order and, therefore, a judgment. There could, therefore, be a stay of it.

Stay depends on the balance of convenience or justice

Since *Chitavira Shopping Centre v HMS Foods & Grain Ltd* ((2015) Civil Appeal Case No 30 (MSCA) (unreported), approving the approach of the court below in *Matupa v Matupa* and now confirmed by the full court in *Mulli Brothers Ltd v Malawi Savings Bank Ltd* ((2014) Civil Appeal Case No. 48 (MSCA) (unreported), the principles for stay pending appeal and interlocutory injunctions are unified. In either case and, of course in cases like them, the court is called upon to provide measures in the interim, almost in the form of an assurance, pending a final outcome, virtually uncertain presently, of future proceedings. The court has to adopt steps, by the measures taken, which, whenever the outcome is known, reduce the incidence of injustice or inconvenience on either party. We have yet to find an approach better than Lord Diplock's in *American Cyanamid v Ethicon*, [1975] AC 396, accepted in thousands of cases, cited by the appellant's counsel, in the court below and in this Court.

In cases as consequential as this one is shown to be and indeed in every such case it is important to apply those principles deliberately and deliberatively in order to achieve a just outcome. Ultimately, the court resolves the matter on balance of convenience or justice. The court, until it disposes the matter on appeal, aims to advance measures that increase the likelihood of justice or convenience and ameliorates the likelihood of injustice or inconvenience on either party.

Of course, there are decisions of this Court to the effect that stay pending appeal must be considered from that a successful litigant must not be deprived of fruits of litigation and that a court also regards the prospect of the final outcome being rendered otiose. These considerations, however, are inadequate to resolve most intricate issues arising from the balancing act which is necessitated by that interim measures base on outcome that is in future and presently uncertain. In case of an appeal, courts are trying as much as possible to avoid an unjust and inconvenient result that could undermine the outcome of the appeal.

For monetary judgments the outcome could be affected by parties' inability to pay; a successful appellant will be inconvenienced and frustrated if refusing execution leaves a judgment debtor incapable or unable to pay. Conversely, a successful respondent will be inconvenienced if staying execution of a monetary judgment results into an unsuccessful appellant unable or incapable of paying. For non-monetary judgments staying or not staying could result in irreversible and permanent determination of a right or entitlement.

It is these considerations that account for why Lord Diplock's statements in *American Cyanamid v Ethicon* are now accepted to be a better approach to staying orders or judgments pending an appeal. In fact, the twine concerns, namely, rendering an appeal nugatory and not depriving a successful litigant, are adequately, if not more, met by applying the broader *American Cyanamid v Ethicon* principles. In this case, the court below, never subjected the matter to even the rigours of the cases of *American Cyanamid v Ethicon*. This was because, for the court below, all descended on the questions it itself framed.

Is there a serious issue on appeal?

The first consideration, therefore, is whether the appeal raises a serious issue, an issue with a real chance of success. The risks described earlier are reason enough for the requirement by law that interim relief, like injunctive relief, relief in equity, should be had where the appeal has a real chance of success and not when there is a remote or just some chance that the appeal will succeed. Unless, therefore, there is some good reason, stay of an order or decision should not be had where there is no real chance that the appeal will succeed. There are serious issues on appeal. The lower court proceeded on a narrower consideration of the principles on which permission or judicial review remedies are granted.

Generally, a court may, not must, decline ordering judicial review where, like in many cases, there are other avenues for the public body to review or redress its decision. This general rule is along another general rule that a court, in an appropriate case, could still grant leave or usher the prerogative remedies albeit the applicant has not exhausted alternative remedies. The court below proceeded on that this was not the case. This court, on appeal, may have to exercise the discretion because the court below never exercised the discretion at all or exercised it improperly under the countenance that a court has no discretion in the matter where alternative remedies are not exhausted. There is, therefore, a real chance that this court, after an address from either side, could exercise discretion in favour of stay. There is more. The lower court proceeded on that the alternative remedies in section 97 of the Taxation Act were available in all circumstances.

Section 97 (1) of the Taxation Act refers to assessment of tax

Section 97 (1) and (2) apply to where the tax payer disputes the assessment by the Commissioner General. They do not apply where, like here, the dispute is whether the tax payer is liable to pay a tax or whether the subject matter is taxable. Consequently, section 97 (1) of the Taxation Act has to be interpreted and be applied to the facts. Section 97 (1) and (2) of the Taxation Act provide:

(1) A taxpayer who is aggrieved by— (a) any assessment made upon him by the Commissioner under this Act;

- (b) any decision of the Commissioner in relation to an assessment; or
- (c) the determination of a reduction of tax under section 123 or section 124,

may appeal to the Commissioner against such assessment, decision or determination in the prescribed manner.

(2) Where an appeal is made to the Commissioner under subsection (1) he—

- (a) may amend the assessment, decision or determination or disallow the appeal;
- (b) shall send to the appellant written notice of his decision on the appeal;
- (c) shall record any amendment of the assessment in the assessment register

Sections 84 and 90 of the Taxation Act cover assessment of tax. Section 84 (1) of the Taxation Act provides:

Every person chargeable with income tax under this Act, shall within 90 days from the end of the year of assessment, as defined in this Act, or such longer time as the Commissioner may allow, prepare and deliver to the Commissioner a return of income in the form approved by the Commissioner for such year of assessment computed in accordance with the provisions of this Act.

Section 90 of the Taxation Act provides:

(1) The Commissioner shall proceed to assess the liability to tax of every taxpayer as expeditiously as possible after the expiry of the time allowed to such taxpayer under section 84 for the delivery of a return of income.

(2) Where the Commissioner has estimated the taxable income or assessed loss of a taxpayer under section 89 (1) he may assess his liability to tax on the basis of such estimation.

(3) Where the Commissioner accepts the taxpayer's estimate under section 89 (2) he may assess him on such estimate, but may subsequently adjust such assessment upon the taxpayer submitting a satisfactory return of income.

Section 2 of the Taxation Act defines assessable income: "assessable income" means assessable income as defined in section 11." Section 11 provides:

The income of a person shall include the total amount in cash or otherwise, including any capital gain, received by or accrued to or in favour of the person in any year or period of assessment from a source within or deemed to be within Malawi and his assessable income shall be that income excluding any amount exempt from tax under this Act.

The Taxation Act distinguishes between self assessed tax and assessment by the Commissioner General. It is unclear from the record from the Commissioner General whether this tax was after Airtel Malawi Ltd's self assessment or the assessment of tax by the Commissioner General after receiving Airtel Malawi Ltd's return of income. Section 97 of the Taxation Act, properly read, provides an appeal procedure for when the Commissioner General has, under section 90 of the Taxation Act, assessed the tax.

Moreover, the appellant here is not disputing the assessment which to my mind, without argument, refers to the determination of payable tax after the tax payer's. The tax payer contends that the tax should be assessed, if at all, against another. That other, however, cannot be taxed. This is a formidable argument, for many reasons. First, it seems that the tax in question should not be payable by Airtel Malawi. It is not clear from the Commissioner General how Airtel Malawi came to be burdened with this tax, except for the suggestion that this was Non-resident Tax. Actually, according to Airtel, the tax is for an acquisition

between principal companies for which Airtel probably is a subsidiary. That tax, according to Airtel Malawi, according to section 11 of the Taxation Act, should not be paid by Airtel Malawi Ltd but the acquirer.

Non-resident tax

The Commissioner General suggests that this is non-resident tax. Part VIIA of the Taxation Act covers non-resident tax. Section 76A of the Taxation Act provides for non-resident tax.

(1) Subject to subsection (3), any income payable to a person, not being a person resident in Malawi, arising from a source within Malawi and not attributable to a permanent establishment of that person in Malawi shall be liable to a final tax at the rate of 15 per cent of the gross amount of such income.

(2) The tax payable under subsection (1) shall be deducted from the amount referred to therein upon—

- (a) accrual of the amount to such person; or
- (b) payment of the amount to such person whether directly to him or to his account in or outside Malawi; or
- (c) remittance of the amount to such person; or
- (d) crediting of the amount or of the value thereof in favour of such person,

and it shall be the responsibility of the person from whom the amount is due to deduct the tax and to remit it forthwith to the Commissioner.

(3) The tax payable under subsection (1) is not payable in respect of—

- (a) income and other amounts exempt from tax under the provisions of the First Schedule; and
- (b) any pension or annuity payment.

The Commissioner General has not come clear whether the tax was, according to section 11 of the Taxation Act, because Airtel Malawi was remitting income acquired in Malawi or, having been acquired in Malawi, Airtel Malawi is remitting that income to a non-resident. If, the situation is what I seem to hear, from Airtel Malawi, namely, Airtel Malawi is asked to pay tax over the purchase of companies beyond it to which it is a subsidiary, this contrasts sharply with what the Commissioner General seems to suggest that the tax is based on that income is generated in Malawi is being remitted to a non-resident. Airtel Malawi may not be liable to the tax in the first scenario and would be liable in the latter. There are, therefore, triable issues. There is another triable issue, whether the alternate procedure applied to where the dispute between the tax payer and the Commissioner General is whether tax is payable at all. This is considered later.

Are Damages an adequate remedy?

In this case damages are an adequate remedy. The tax is ascertainable and easy to assess. The question, therefore, is whether the parties can pay them. It is not demonstrated by evidence that, if Airtel paid the taxes, the Commissioner General, were Airtel Malawi Ltd to succeed, will be able to pay. This is not a fact that the court can take judicial notice of. It should be demonstrated by evidence that, if paid now, the Commissioner General will be able to pay back the tax. In the absence of such proof, the court may, in its discretion grant the stay. Conversely, the stay may be declined, if the applicant, in this case Airtel Malawi, is incapable of paying. It behooves all parties, therefore, when there is an application for stay involving money to, by affidavit, demonstrate their capacity to pay.

Airtel Malawi Ltd, as it should be, demonstrated ability to pay. Airtel Malawi Ltd annually pays K 17.2 billion in taxes; if this is what they pay in taxes, their turn over and income must be much higher and, therefore, able to absorb this indebtedness at

any time. It does not follow, however, that if an applicant shows capacity to pay, stay of execution will be granted as a matter of course. The matter is still discretionary.

Secondly, a different direction from the Commissioner General only arises where there is an appeal against an assessment by the Commissioner General under section 97 of the taxation Act. Section 105 (1) and (2) does not apply where there is an appeal to a special arbitrator (section 98 of the Taxation Act), traditional court (section 100 of the Taxation Act) or the High Court (section 101 of the Taxation Act). In this case, the appellant never appealed to the Commissioner. There is a judicial review of the decision. Proceeding under section 97 of the Taxation Act, which deals with appeals against assessments, therefore, was not an alternative remedy to Airtel Malawi Ltd's contention that the income, the subject of the Commissioner's demand, was never received by it and, if anything, arose from outside the country.

Balance of Convenience

Just to maintain the status quo

On balance of convenience or justice, this court must opt for a measure, staying or allowing the tax to be paid now, that irrespective of the outcome of the appeal, will be less inconvenient or yield less injustice. The first consideration is whether less injustice or inconvenience will be caused by maintaining the status quo. Where leaving matters as they are may be the just thing to do, it is important to consider the prospect of the appeal succeeding and avoid refusing stay where it creates a new situation. The status quo, however, must be just or convenient to either party. Where the status quo may, on balance, be unjust to another party, the discretion must be exercised with the most circumspection. Consequently, where the matters are in a balance, it may be important to look at other considerations, like the relative strength of the parties' cases. In this matter, the status quo is the situation where Airtel Malawi does not pay the taxes now. The Commissioner General, however contends that under section 105 (1) and (2) of the Taxation Act Airtel Malawi Ltd should pay immediately, unless, of course, the Commissioner General acts under section 105 (1) and (2), order differently. Sections 105 (2) provides:

(1) Any tax chargeable under this Act is payable by the due date as provided in this Act.

(2) Notwithstanding that an appeal against an assessment has been made under section 97 the tax shall be paid as provided in subsection (1) unless the Commissioner otherwise directs:

Provided that, if the Commissioner has reason to believe that the taxpayer may attempt to leave Malawi without intending to return without settling his liabilities under this Act, the Commissioner may require the taxpayer to pay the whole of such tax forthwith.

There are three aspects to this provision. The first aspect is that the tax is payable on a date as provided in the Act. The Taxation Act does not prescribe the date when tax should be paid. The nearest one can get are sections 92 (2) and 107 (1) of the Taxation Act. Sections 92 (2) of the Taxation Act provides:

Notice of assessment and of the amount of tax payable, where tax is payable, shall be given to the taxpayer assessed.

Section 107 (1) of the Taxation Act provides:

Any tax shall when it becomes due or is payable, be deemed to be a debt due to the Malawi Government and shall be payable to the Commissioner in the manner and at the place prescribed, and may be used for and recovered by the Commissioner in any court of competent jurisdiction.

The sections do not provide a date as such. The word 'manner,' however, in the penumbra and umbra of meaning, is broad enough to include the date. In this respect, there seems not to be an assessment under the Act. This court does not have a notice of assessment. The prescribed date is not known.

The proviso, however, suggests that the tax payer, as long as is not leaving the country, may not have to pay the tax forthwith. It is unclear whether the Commissioner General gave time. The provisos, therefore, empowers the Commissioner General to either demand immediate or deferred payment. Airtel Malawi Ltd complains that the Commissioner General, immediately after the court below dismissed the application for judicial review, demanded payment within seven days. The Commissioner General never considered the better option to require the appellant, given the amount, to pay within a reasonable time. The Commissioner, in my judgment, could only do so after giving reasons for opting for the severer option.

Thirdly, the provision allowing the Commissioner General to make a different order for payment other than the one prescribed by the Act is enabling. It itself is subject to judicial review and therefore cannot be an alternate remedy. Where, therefore, the issue is whether the tax is payable at all and by payable by a tax payer, that the Commissioner can order payment on a different date cannot be relevant.

The scheme of the Act is that tax must be paid while the appeal is *en process*. As I understand it, the section applies when there has been a self assessment, approved by the Commissioner General, or an actual assessment by the Commissioner General of based on returns. This seems not to be the case here; at least it is not shown to be the case. From Airtel Malawi, there was no such return or assessment by the Commissioner on the subject of the tax. From the Commissioner General it seems that this is a Non-Resident Tax. Airtel Malawi is resident in Malawi. The tax should, if at all, be paid by another. This is a serious consideration.

The status quo, sought by Airtel Malawi Ltd, as seen, is where Airtel Malawi Ltd does not pay the taxes immediately. The question is whether this status is just to either party. In *Sondhi v Zembere and another* (2010) Civil Cause No 632 (HC) (PR) (unreported), the court below cited this statement from Lord Goddard in *Thompson v Park* [1944] 1 K.B. 408, 410:

It is a strange argument to address to a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and to say that that would be preserving the status quo and a good reason for not granting an injunction.

The Court below then said:

Justice, when considering whether or not to grant an interim injunction, may be achieved by retaining status quo but only and only if doing so will not result in injustice, unfairness or inconvenience.

I think that the status is just to Airtel Malawi, if, as Airtel Malawi contends, the tax should not be paid at all or, if at all, should be paid by someone else, it is inconvenient that the Commissioner General should have it immediately. On the other hand, the Commissioner General must collect taxes immediately so that they are available for use for approved government public programs. In *R v Licensing Authority, ex p Smith Kline & French Laboratories Ltd (Generics) UK Ltd and another* [1989] 2 All E R 113, 126, Lord Woolf said:

I also bear in mind that the licensing authority is performing a statutory duty. It is a duty which it is required to perform and the court, in my view, should be hesitant in granting relief which interferes, even on an interim basis, with the performance by the statutory authority of this role. When one contemplates the problems involved in granting the sort of interim relief which the applicant seeks, I have come to the conclusion that as a matter of discretion this court should refuse that relief.

This, however, does not comport that the Commissioner General must collect taxes from people who should not pay them or on subject matter that does not attract taxation. It is concomitant with justice that the Commissioner General must collect taxes from those who are legally liable and on subject matter that is legally taxable. In this respect, the balance of convenience or justice favours granting stay. If the balance of convenience or justice is otherwise, it, with the prior consideration, is only to stress that maintaining the status quo does not really resolve the balance of convenience. The relative strength of the parties' cases may, therefore, have to be considered.

Relative strength of the parties' cases

This is a configuration of the need that stay of an order should be based on the likelihood of the success of the appeal. The court must, as it must be, be wary that at this stage it is not determining the appeal and its application bases on statements of truths, not tested evidence. Where, however, granting stay, where there is a matter for appeal, damages are an inadequate remedy and the matter is not resolved by considering maintaining the status quo, stay may, without determining the appeal, lean in the direction of the stronger case. This is not to prejudge the case. It is, rather, that given the nature of the interim relief, less inconvenience or less injustice follows where the interim relief is given to the party that, even though uncertain at the time of the relief, ultimately succeeds.

There is in fact more inconvenience if stay is accepted or refused to the successful party. Granting stay to a party with the stronger case, a value judgment, is a lesser evil. Where, however, maintaining the *status quo* does not adequately resolve whether or not to grant interim relief, in balancing justice and convenience, courts consider the relative strength of the parties' cases. In doing so, courts are mindful that, first, matters should be resolved at the full hearing and, secondly, that the exercise bases on affidavit

evidence which has not been tested or contested. There is, however, quite some wisdom in that where, based on the affidavit evidence before the court, granting or refusing the interim relief must go towards a party who, on prospect, is likely to succeed at the end of the proceedings. In doing so, the courts assess the risk or probability of the party succeeding. The rationale of the principle is that injustice or inconvenience is reduced and less precipitous for a party likely to succeed *Chauluka v FDH Bank* (2013) Civil Cause No 383 (HC) (PR) (unreported); *Drivers and Vehicle Diplomats v Minibus Owners Association of Malawi (MOAM)* (2013) Civil Cause No 599 (HC) (PR) (unreported); *Traditional Authority Nkalo v Group Village Headman Maoni* (2013) Civil Cause No 345 (HC) (PR) (unreported); *Chitawira Shopping Centre v HMS Foods & Grain Ltd* ((2015) Civil Appeal Case No 30 (MSCA); and *Mulli Brothers Ltd v Malawi Savings Bank Ltd* ((2014) Civil Appeal Case No. 48 (MSCA) (unreported). In *Drivers and Vehicle Diplomats v Minibus Owners Association of Malawi (MOAM)*, it was said in the Court below:

Balancing inconvenience or justice may, at a certain level of abstraction, imply considering relative strength of the parties' cases. In *Chauluka v FDH Bank* this court said:

"Aware that I am not determining the main action, where maintaining status quo would be unfair, justice in granting or refusing an injunction may be achieved by considering the relative strengths of a party's case. Generally, this must be done when in a case there is nothing to separate between the parties on the inconvenience and injustice they might suffer, mindful that the comparison is based on affidavit evidence and where there is a clearly a case made out showing a very likely result for one case as against the other. Where a court, on clear and admitted facts, concludes one party's case is much stronger, the interim relief may have to be directed accordingly (*Series 5 Software v Clarke* [1996] 1 All E.R. 853; *Series 5 Software v Clarke* [1996] 1 All E.R. 853; *Fellows & Sons v Fisher*, *ibid.*"

In this case, it dawns to one that on the matter under judicial review, the questions are whether the tax is payable at all and the tax payer is the one to pay it. On the face of it, this is a triable issue. The court below, however, thinks that judicial proceedings should fail because Airtel Malawi never had recourse to alternative remedies. There are three matters that the court below never considered.

First, in respect of the Taxation Act this requires the consideration whether, based on the Taxation Act itself and other general considerations, the matter is amenable to the appeal procedure. The appeal procedure is only available to where there was assessment of tax and relates, therefore, to the assessment. The appeal procedure does not apply to the question, like the one presently before this court, whether certain tax is payable or the tax payer is the one to pay it. That is not an assessment question and is not covered by the assessment procedure covered here. Consequently, even if the matter was amenable to the appeal procedure, the Commissioner General and the special arbitrator, who can only deal with tax assessments, were either the wrong forum or could not properly or adequately handle the matter the basis of the judicial review.

The law, as I understand it, is that recourse to alternative remedy may not prevent judicial review where the alternative remedy is either inadequate or unavailable to resolve a matter the subject of judicial review proceedings. All remedies, compelling, prohibitive and quashing orders, available on judicial review are discretionary. It does not follow that because a right to judicial review has been established, that a court will usher the remedies. There are bound to be cases, and this could be one of them, where even if the right is established, the court would refuse the remedies. Judicial review remedies are not given *ex debito justitiae*, as a matter of right, but as a matter of discretion. At (1) para 12 page 270 of Halsbury's laws of England 4th Ed. Vol. 1, the learned authors say:

The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)... are all discretionary. The court has a wide discretion whether to grant at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waive to the right to object may also result in the Court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile. Whether practical problem, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the

form of the order would require close supervision by the court or be incapable of practical fulfilment. The court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.

The Court below relied on *R v Epping and Harlow General Commissioner*, ex parte Goldstraw ([1983] 3 All ER 257, 262, a statement by Lord Justice Donaldson, MR. There are statements to the like effect in *The State v the Electoral Commission*, ex parte Mluzi and another (2009) Constitutional Case No 2 (HC) (Const) (unreported); *The State v the Director of Public Prosecution*, ex parte Chilumpha (2005) Civil Case No 315 (HC) (PR) (unreported); and *The State v Traditional Authority Sibunde*, ex parte Phiri (2014) Civil Case No 15 (HC) (MZDR) (unreported). On the general principles, all these decisions are good law. Lord Scarman in *R v Inland Revenue Commissioners*, Ex parte Preston [1985] AC 835, 852, said

[A] remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

Even from this oft quoted passage, Lord Scarman supposes a possibility, albeit a rare one, that a matter may be amenable to judicial review where the applicant has not exhausted other remedies.

The requirement that judicial review remedies should be granted upon exhaustion of alternative remedies should not only be approached from the perspective that the High Court took that judicial review remedies should be refused whenever the applicant has not exhausted other remedies or avenues of redress. Conversely, it does not follow that because the applicant has exhausted all avenues or remedies that judicial review remedies should be granted as a matter of course. Judicial review remedies are and it is a matter of discretion whether they will be granted or refused because the applicant has not exhausted other remedies. In *R v Epping and Harlow General Commissioners*, Ex parte Goldstraw [1983] 3 All ER 257, 262, Sir John Donaldson, MR, stated:

"... save in the most exceptional circumstances, that [judicial review] jurisdiction will not be exercised where other remedies were available and have not been used."

There is rigidity in the principle which attracts this comment from Wade and Forsyth (*Administrative Law*, 9th Ed, 2004, p 708 - 9:

In reality the courts are better than their word. When genuine grounds for judicial review are alleged, it is the refusal rather than the grant of review which is the exceptional course.

In Malaysia, in *Government of Malaysia & Another v Jagdis Singh* [1987] 2 MLJ 185, Tan Sri Hashim Yeop A. Sani, said:

A clear principle is reiterated here that is, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances."

Lans Koperal Chellapan A/L Kantassamy v Mejar Wan Ghzali bin Wan Din & 2 others [1993] 4 CLJ cited this passage and the court stated:

From the authorities cited the trend would be towards a liberal approach in tackling the question of judicial review in respect of certiorari. The need to exhaust the domestic remedies should not fetter the discretion of the High Court in granting leave 'where there are very exceptional circumstances or a clear lack of jurisdiction or blatant failure to perform some statutory duty or where there are serious breaches of the principles of natural justice."

The Supreme Court of Malaysia added

... [W]hether a grievance should be redressed only by way of appeal or by way of judicial review regardless of a domestic remedy available, must turn on whether the complaint is one of 'abuse of power'. We use this term in its widest sense and equate it to 'as that term is used today to include, inter alia, a denial of a legitimate expectation, a breach of natural justice or a making of a decision which is irrational and unjust. Such a situation would be 'exceptional or very exceptional' because the objective of the decision-making process is to make lawful decisions within the ambit of the statutory powers conferred."

The words 'clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice' which occur in the core passage of *Jagdis Singh* cannot today be treated as exhaustive but only as a series of open-ended instances in which the court will intervene.'

In American common law, consequently, there are basically two categories, not exhaustive, of instances where a court may overlook alternative remedies or avenues. In *Tiernan v Trustee of California State University & Colleges* (1982) 23 Cal.3d 211, 217, the court said:

It is settled that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is either unavailable or inadequate.

The Court determined that a remedy is unavailable if it cannot resolve, adequately, by the available grievance mechanism. In *(Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 620, it was said that a remedy is inadequate "if it does not square with the requirements of due process" or if the decision maker lacks the power to fashion an appropriate remedy.

There is an informative principle, facts on which it is premised appearing in the statement by Warren L H Khoo J in *Chiam See Tong v Singapore Democratic Party* [1993] 3 SLR(R) 774, :

The subject of exhaustion of internal remedies has been well discussed by Ungood-Thomas J in *Lawlor v Union of Post Office Workers* [1965] 1 All ER 353, and by F A Chua J (as he then was) in *Visvasam v Singapore Taddy Tappers' Union* [1968-1970] SLR(R) 275.

It is clear that the construction of the rules of the defendants is a matter of law for the courts. The question whether the rules of natural justice have been observed is also eminently a matter for the courts. It is no disrespect to say that the party conference of the defendants is hardly an appropriate forum to decide such questions. The issue of the rights and wrongs of the expulsion of a member is likely to be decided by that forum on considerations quite different from those applicable in a court of law.

Furthermore, the next ordinary party conference will not be held for some time. The constitution provides that one should be convened every two years, and the last one was held only in January this year. The plaintiff tells me that that would have been too late for him because his seat in Parliament was in the balance because of his expulsion from the party, and there was need to have an early resolution of his status there. He had therefore to take action in court immediately.

In *White v Kuzych* [1951] AC 585; [1951] 2 All ER 435, the Privy Council decided that a member of a trade union was bound to exhaust a right of appeal within the union before resorting to the courts. In that case, however, there was an oath of obligation whereby members promised not to resort to the courts until they had exhausted all remedies provided by the union's constitution and bye-laws. There is no such obligation in the present case. This is an additional reason for holding that the plaintiff is not out of order in coming to court before exhausting the right of appeal to the party conference.

The Court, however, when considering circumstances, must consider all circumstances, giving appropriate weight to any circumstance. Emphasizing a minor factor is as precarious to discretion as undermining a material factor.

This case is where the alternative remedy was unavailable and, if not, inadequate (*R v Deputy Governor of Parkhurst Prison, Ex parte Leech* [1988] AC 533; *R (Hoverspeed Ltd) v Commissioners for Customs and Excise* [2003] QB 1041, paras 57 - 8. (4); *R v Monmouth District Council, Ex parte Jones* (1987) 53 P&CR 108). In certain cases where speed, dispatch and urgency are necessary, judicial

review may be preferred to existing remedies, per Lord Widgery CJ in *R v Hillingdon London Borough Council, Ex parte Royco Homes* [1974] QB 720, 729. May LJ in *R v Chief Constable of Merseyside Police, Ex parte Calveley* [1986] QB 424, 436, however, thought that urgency in itself may not be a reason for abandoning alternate procedures. This case, moreover, coheres with *R v Huntingdon District Council, Ex parte Cowan* [1984] 1 All ER 58 where Glidewell J allowed the applicant to seek judicial review of a licensing decision rather than use the appeal procedure where a court is to give guidance or provide an authoritative pronouncement on a matter of public concern or interest.

In this case, in addition to what follows shortly, *Airtel Malawi Ltd* had, and it should not have because this was not an assessment of tax issue, resorted to the appeal procedure. The matter went before a special arbitrator. The Commissioner General never complied with certain procedural steps. The special arbitrator, inexplicably, thought that he could not dispose of the matter. Meanwhile, the Commissioner General insists on immediate payment. The court below thinks that there should be no stay because the appeal from the special arbitrator's is pending.

The court below should not have approached the matter that way. Rather, in deciding whether to stay or not, that there was a pending decision, as described, was one of the circumstances to consider. The special administrator's decision, meant, even where *Airtel Malawi Ltd* never appealed against it, that the appeal was at an end. Section 97 of the Taxation Act only applies where there is a pending appeal and on a tax assessment. The situation was, therefore, where *Airtel Malawi Ltd* had, albeit erroneously, deployed the appeal procedure. *Airtel Malawi Ltd*, since there was no appeal, could not invoke section 97 of the Taxation Act for the Commissioner General to exercise the power under the Act. The question, therefore, what would a tax payer whose appeal against assessment has failed, wanting to stay immediate payment of tax that should not be paid, must do?

This depends on distinguishing an appeal against an assessment and judicial review proceedings to resolve whether tax is payable and, if payable, the tax payer is one to pay it. The latter are not assessment questions. Consequently, a tax payer may make the two applications concurrently or simultaneously. A tax payer may opt to first consider recourse to judicial review and, if that fails, challenge the assessment. A tax payer may, as happened here, opt to first consider the assessment question and, if that fails, recourse judicial review. Where, therefore, the tax payer does not appeal against the arbitrator on an assessment, it must be taken that the appeal procedure under the Act has been exhausted. That ushers the tax payer to pursue judicial review remedies. The stay question cannot, in the absence of the appeal, be a matter for the Commissioner General, but for the court determining the judicial review.

The alternate mechanism in this case, however, was not designed for the application like the one by *Airtel Malawi*. The alternative mechanism is confined to specific matters not covered by the application for judicial review. Section 96 (1) of the Taxation Act provides for the procedure on appeals:

An appeal under this Act shall be made in accordance with the provisions of this Part and of the Eighth Schedule.

Part X of the Taxation Act provides for appeals to the Commissioner General (section 97), a special arbitrator, the High Court and a traditional court. The appeal championed by the Commissioner General relates to appeals to the Commissioner General under section 97 (1) of the Taxation Act.

Section 97 (1) (a) and (b) are pertinent. Section 97 (1) (a) and (b) relate to assessment. There must have been an assessment made by the Commissioner General or another. Part IX covers assessment of taxes. Assessment of tax commences by the tax payer submitting a return of income. Section 84 of the Taxation Act provides:

(1) Every person chargeable with income tax under this Act, shall within 90 days from the end of the year of assessment, as defined in this Act, or such longer time as the Commissioner may allow, prepare and deliver to the Commissioner a return of income in the form approved by the Commissioner for such year of assessment computed in accordance with the provisions of this Act:

Provided further that this subsection shall not apply, except of his own volition, to an individual whose total income is only from employment or pension or from both employment and pension and does not exceed K30,000, from which P.A.Y.E. has been deducted.

(2) The Commissioner may, by notice in writing require any person to prepare and deliver to him, within 30 days of the date of issue of such notice, or such longer time as the Commissioner may allow, a return of income in the form approved by him for a year of assessment.

(3) Any person signing any such return of income shall be deemed for all purposes in connexion with this Act to be cognizant of all statements therein.

(4) All returns of income required to be furnished under this Act shall be delivered at or sent by post to the address given in the approved form:

Provided that in the case of an individual chargeable with income tax under this Act in respect only of his income from employment or pension or from both and in relation to which income P.A.Y.E. tax has been deducted, he shall not, except of his own volition, be required to prepare and deliver to the Commissioner a return in respect of such income.

A return of income prepared and delivered by a taxpayer in accordance with the provisions of this Act shall constitute a self-assessment by the taxpayer.

Where a taxpayer has delivered a return of income, the Commissioner may accept the return and deem the amount the taxpayer has declared as the self-assessment of the taxpayer.

Every person chargeable with income tax who—

- (a) is required to prepare and deliver a return of income; or
- (b) is not required to prepare and deliver a return of income but opts to do so under the provisions of this Act,

shall apply in the prescribed form to, and obtain from the Commissioner a permanent taxpayer identification number for use in all correspondence for the purpose of this Act.

(2) Where an appeal is made to the Commissioner under subsection (1) he—

- (a) may amend the assessment, decision or determination or disallow the appeal;
- (b) shall send to the appellant written notice of his decision on the appeal;
- (c) shall record any amendment of the assessment in the assessment register

After receipt of a return of income, unless the Commissioner General accepted the self assessment under section 90 (2), the Commissioner General proceeds to assess the income for tax. Section 90 of the Taxation Act:

(1) The Commissioner shall proceed to assess the liability to tax of every taxpayer as expeditiously as possible after the expiry of the time allowed to such taxpayer under section 84 for the delivery of a return of income.

(2) Where the Commissioner has estimated the taxable income or assessed loss of a taxpayer under section 89 (1) he may assess his liability to tax on the basis of such estimation.

3) Where the Commissioner accepts the taxpayer's estimate under section 89 (2) he may assess him on such estimate, but may subsequently adjust such assessment upon the taxpayer submitting a satisfactory return of income.

Part X of the Taxation Act procedure only relates to assessments described. That this is the case is confirmed by other provisions in the Act. Section 91, dealing with additional assessment, confirms the assessment:

(1) If the Commissioner discovers or is of the opinion at any time that any taxpayer has not been assessed or has been assessed at a less amount than that which ought to have been charged he may within the year of assessment or within six years after the expiration thereof and as often as may be necessary assess such person at such amount or additional amount as according to the best of his judgment ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this

Act shall apply to such assessment or additional assessment and to the tax charged thereunder.

(2) Where any fraud or wilful default has been committed by or on behalf of any person in connexion with or in relation to tax for any year of assessment the Commissioner may, for the purpose of making good to the revenue of Malawi any loss of tax attributable to the fraud or wilful default, exercise the powers conferred by this section at any time, whether before or after the expiration of the period specified in this section:

Provided that where the person by or on whose behalf the fraud or wilful default was committed has died an assessment on his personal representatives to tax for any year of assessment ending not earlier than six years before his death shall be made at any time before the end of the third year next following the year of assessment in which he died.

Section 92 of the Taxation Act talks about assessments and notices thereof:

(1) All assessments required to be made under this Part shall, subject to section 4, be made by the Commissioner or under his direction.

(2) Notice of assessment and of the amount of tax payable, where tax is payable, shall be given to the taxpayer assessed.

(3) The Commissioner shall, in the notice of assessment, give notice to the taxpayer that any appeal against the assessment must be sent to him within 30 days after the date of such notice.

Section 93 of the Taxation Act talks about these assessments being the register of assessments:

Complete copies of all notices of assessment made under this Part shall be filed in the office of the Commissioner and shall constitute the register of assessments for the purposes of this Act.

Section 94 of the Taxation Act covers inspection of these assessments.

The register of assessments shall not be open to public inspection, but every taxpayer shall be entitled to copies certified by or on behalf of the Commissioner of his own notice of assessment.

Section 97 (2), dealing with the powers of the Commissioner General, strengthens the conclusion that section 97 (1) refers to appeals against assessments

Besides these provisions, the Taxation Act provides for other avenues to deal with aspects other than assessment of tax. Section 107 (1) of the Taxation Act provides for recovery by a suit in court (Magistrate court, with no limit as to amount). Section 107 (3) of the Taxation Act provides for distress. Section 107A) of the Taxation Act provides for a lien. The appeal procedure under the Taxation Act the Commissioner General mentions only relates to assessment of tax. It was not designed for the question under consideration. It is inadequate and unavailable to Airtel Malawi on the question under review. The only remedy available to Airtel Malawi was litigation.

The Commissioner General had not resorted to litigation so that Airtel Malawi should raise the defences raised. The only option available to Airtel Malawi was judicial review. Where, like here, actions, omissions or commissions of a public officer in relation to statutory or other duty are questioned, the citizen should proceed by way of judicial review. Consequently, besides that the court has discretion, even where alternative remedies remain unexhausted, it is doubtful that Airtel Malawi Ltd could, given their application, avail the alternative remedies. There is, therefore, a real chance that Airtel Malawi Ltd would succeed.

Other considerations

Under this consideration the court in its exercise of discretion can consider matters of public or commercial concern. If the court were to act otherwise, ignoring matters of common concern by ordinary citizens, the law would be aloof and attract the

approbation of fair minded people who expect the law and the institutions possible for law and justice to be even handed and relevant. In this respect, the Commissioner General must not be led to think that the court will, at any step of the Commissioner General's activities, a court will be big brother. On the other hand, the court will, in an appropriate case, assume its usual role. Airtel Malawi, however, has from a business and commercial concern, raised matters which cannot be overlooked. First of all, the full and frank statement from Airtel Malawi Limited is that it generates a sizeable amount of revenues that account for quiet some chunk in coffers. Secondly, it does seem that paying the huge tax now would dent its operations, more so, because it has other financial obligations from decisions by the Malawi Communications Regulatory Authority to comply with measures introduced by Malawi Communication Regulatory Authority. Airtel Malawi Limited suggests, correctly in my judgment, that having to pay all its tax at this stage, may reduce its revenues and ultimately, the amount of taxes available to the Commissioner General. These, coupled with the general question whether the taxes should be paid at all and by Airtel Malawi Limited, makes it business sense to stay the payment of the taxes until the liability to pay tax is finally determined on appeal or until the proceedings are concluded.

Does stay give a full remedy?

The stay of the order or decision of the court below does not give either party the substratum of the matter subject of this legal contest. In matters like these, courts are wary in refusing or allowing interim relief whose consequence might be the granting of a full remedy on the matter contested. In this case, allowing stay does not have such an outcome; even if it had, so be it. Where, therefore, an interim relief is likely to dispose of the matter, the words of Lord Diplock in *N.W.L. Ltd v Woods* [1979] 1294, 1307, are instructive:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeed in establishing his right to injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other".

If Airtel Malawi Limited, who sues this stay, is unsuccessful, it will continue to be liable for the taxes. Consequently, the Commissioner General will be able to recover the taxes.

Disposal

The order or decision of the court below is, therefore, stayed until this court determines the appeal against dismissal of the motion for judicial review. Airtel Malawi Ltd does not have to pay the tax

The gravity of the concerns, however, is reason why the matter should be resolved very quickly. For quick resolution of this matter, the Registrar of the Court below and this Court, together with the parties, must work expeditiously to have the appeal heard as soon as possible. To that end, if the partes have not done so, the appellant must file skeleton arguments 14 days from the date of this order. The respondents must file their skeletal arguments within 14 days of this order. The parties may have to agree on the contents of the record which, in this case, comprises very little. The record must be ready in and lodged with the registrar of the court below in the next 42 days. The Registrar of this court must set the case down for a date not less than 21 days after filing the record of appeal.

Made this 8th Day of November, 2016

D.F. MWAUNGULO,

JUSTICE OF APPEAL