



IN THE SUPREME COURT OF APPEAL

MISCELLANEOUS CRIMINAL APPLICATION NO. 04 OF 2024

(Being Criminal Case No. 6 of 2023 Before the Financial Crimes Division of the High Court – Lilongwe Registry)

BETWEEN:

MWABI KALUBA.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA SC, JA

: Mr Soko, of Counsel for the Applicant

: Mr Chiwala, of Counsel for the Respondent

: Mr Chindilanga, of Counsel for the Respondent

: Mr Sambani, of Counsel for the Respondent

RULING

Kalembera SC, JA

This is an Order on the Applicant's application for stay of proceedings pending the determination of certain points of law by the Supreme Court of Appeal. The application is brought under the inherent jurisdiction of this Court. The application is supported by an affidavit sworn by the Applicant, Mwabi Kaluba, as well as skeletal arguments. The Respondent is opposing this application and has filed an affidavit in opposition sworn by Ellen Chandilanga, of Counsel for the Respondent, as well as skeletal arguments.

Brief facts of this matter are such that the Applicant is appearing before the Financial Crimes Division of the High Court under Criminal Case No. 6 of of 2023 charged

with offences contrary to section 29 (1) as read with section 34 of the Corrupt Practices Act. This was a result of investigations by the Anti-Corruption Bureau (ACB) after receiving a complaint alleging that Zuneth Sattar and his Agent, Ashok Kumar Speedharan aka Ashok Nair had been giving bribes to Politically Exposed Persons with the aim of influencing various Malawi Government Departments to corruptly award contracts to Zuneth Sattar's companies. The ACB had also received information from National Crimes Agency that it had come across information that Mr Zuneth Sattar was involved in corrupt activities with public servants and private individuals in Malawi including corruption in procurement of goods and services, Thus investigations by the ACB led to the arrest of the Applicant.

Before trial commenced there was an application for stay pending the determination of certain points of law by the Supreme Court of Appeal. On 9th May 2024, the High Court delivered its ruling dismissing the application. Hence the application before this Court. The Applicants is seeking that his criminal proceedings in the Court below be stayed pending the resolution of the following questions of law by this Court in the case of **The State on the Application of Kezzie Msukwa and another v The Director of the Anti-Corruption Bureau:**

1. Whether, pursuant to Section 5 of the Mutual Assistance in Criminal Matters Act (Cap 8:04) of the Laws of Malawi (MACMA), the Anti-Corruption Bureau (ACB) as an agency of the Government of Malawi, may enter into mutual assistance arrangements with organizations or agencies, whether international or foreign [such as the National Crimes Agency of the United Kingdom], without the sanction of, or going through, the office of the Attorney General.
2. Whether evidence gathered by the ACB, through such informal arrangements, is admissible in criminal trials in Malawi.

It is my understanding from the Applicant, as deposed, that Disclosures which were served on him indicated that part of the material that the Respondent intends to rely on is information that was passed on to it by agents of the National Crimes Agency of the United Kingdom between March 2021 and July 2022. Further, that it is clear from the statements of Jonathan Meredith and Mark Reeves, marked exhibits **MK 1** and **MK 2**, respectively. That the legal propriety of the ACB receiving such information through informal cooperation arrangements with the NCA, as opposed to the said information being requested for and received by the Honourable Attorney General was the subject of a judicial review application in the case of **The State on**

the Application of Kezzie Msukwa and another v The Director of the Anti-Corruption Bureau, Judicial Review Case No. 54 of 2021. The Court was also called upon to determine on the legal propriety of the ACB proposing to rely on this material in a criminal trial against the Applicants, when the said material was collected in breach of the Applicants' right to privacy. The High Court dismissed the application on 30th May 2022. The Applicants appealed against that decision, and also obtained a stay of the commencement for their prosecution pending a determination of their appeal. The Order of stay was issued on 28th July 2022.

Counsel Soko for the Applicant, has strongly argued that the Applicant's trial be stayed pending the determination of the said questions of law in the said **Kezzie Msukwa** case by the Supreme Court of Appeal. He contends that it would not augur well to proceed with the Applicant's trial herein before those questions are determined. And that if the question whether the ACB was competent to receive evidence from NCA in the absence of a request from the Attorney General was answered in the negative there would be no case in the High Court. That if the law is settled in the **Kezzie Msukwa case** we shall all follow the law. And that there is no need to argue in the High Court matters that are already before the Supreme Court.

As earlier observed the Respondent is opposing this application. Counsel Chiwala for the Respondent has strongly argued that no evidence has so far been declared illegally obtained. That in the event that such evidence is tendered the Applicant would have a right to object to it. Further, that the evidence being referred to was obtained or taken within Malawi by ACB investigators, and therefore no need for the Attorney General to sanction that.

From the outset I must state that in this matter there is no appeal or pending appeal and that this application is grounded on the inherent jurisdiction of the court. In the case of **The State (on the application of Esther Kathumba & Others v The President, Judicial Review No. 22 of 2020,** the High Court had this to say:

"The doctrine of inherent jurisdiction helps the Court to achieve justice where it would not have been possible to do so: See Grobbelaar v New Group News Papers [2002] WLR 3024 where in the House of Lords adopted the definition by Jacob in his article "The Inherent Jurisdiction of the Court (1970) 23 CLP 23" which state as follows:

"The inherent jurisdiction of the court may be defined as being the reserve or fund of power, residual source of powers, which the court may draw upon as

necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

Another way of putting it is that inherent jurisdiction remains the means by which Courts deal with the circumstances not proscribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of every action.”

And in the case of **Bonaventure Systems Inc. v. Royal Bank (1987)**, 1986 CanLII 2550 (ON SC), 57 O.R. (2d) 270, 16 C.P.C. (2d) 32 (Div. Ct.) it was stated as follows:

“The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process.....In the civil context, this general power is also embodied in the very broad terms of s.106 of the Courts of Justice Act, R.S.O. 1990, Chap, C.43....Recently, Mr. Justice O’Connell has observed that this discretionary power is “highly dependent on the facts of each particular case.” (paras 14-15)

Thus this Court is competent and has inherent jurisdiction to hear and determine this application. More so that section 7 of the Supreme Court of Appeal Act mandates a Single Member of the Court to hear and determine any application which is not concerned with determining an appeal. It provides as follows:

“A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal.

Provided that –

- (a) In criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;*
- (b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.”*

It is very clear that there is no appeal before the Court and the application before me does not involve the hearing and determination of an appeal. The application is therefore competently before this Court.

The main issue for determination is whether the application for stay of the said criminal proceedings under Criminal Case No. 6 of 2023 before the Financial Crimes Division of the High Court be granted or not.

The application for stay herein, is premised on the determination of certain particularized questions of law by the Supreme Court of Appeal in the said **Kezzie Msukwa case**. Ordinarily this court can grant or refuse the grant of a stay order under its inherent jurisdiction in conformity with statutes and rules of practice –see **Kainja v The Director of the Anti-Corruption Bureau and others, Judicial Review Case No. 48 of 2022**. In the case of **Malawi Law Society v Registrar of Financial Institutions, MSCA Civil Appeal Case No. 9 of 2021**, quoting Chipeta SC, JA in the case of **Parliamentary Service Commission v SJR Catering Services [2018] MLR 198** stated that the inherent jurisdiction of court should not be called upon just to serve the convenience of a party but to serve the interests of justice. The court further stated as follows:

“...we make the point here that we are not and would not be persuaded to exercise any jurisdiction outside the rules merely to assist a party who has proceeded in an intelligent, tardy, unconscionable and inequitable manner such as the present appellant who appears to have taken advantage of the order staying the execution of the judgment below to the disadvantage of the parties in the case.”

Thus, the grant or refusal of a stay must at all times serve the interests of justice. In the matter at hand as already alluded to herein, there is no appeal. The appeal is in the **Kezzie Msukwa case**, which the Applicant herein is purportedly relying upon.

Further, in **Mike Appel & Gatto v. Saulosi Chilima [2013] MLR 231** the Supreme Court of Appeal approved the principles set down in the English case of **Hammond Suddards Solicitors v. Agrichem International Holdings [2001] EWCA Civ 2065** where it was held that “...the court has discretion whether or not to grant a stay;” and that “whether the Court should exercise its discretion to grant a stay will depend upon all the circumstances of the case. But the essential question is whether there is a risk of injustice to one or the other or to both parties if it grants or refuses a stay”

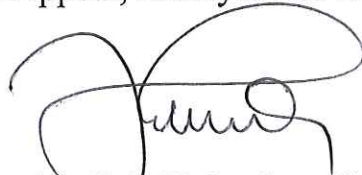
In the matter at hand as earlier observed the application is grounded or premised on the appeal in the **Kezzie Msukwa case**. This court has no control as to what happens in that case, As again observed herein, the order for stay in the said case was granted or issued on the 28th day of July 2022. To date, the appeal in that matter has not been heard or determined. Would it be just to grant a stay order on the basis of that case?

Or would it be just to refuse the grant of a stay order on the basis of that case? The courts have constantly held that each case should be determined on its own peculiar facts. In the court below the judge rightly and correctly held that the Applicant herein is not a party to the **Kezzie Msukwa case** and that the questions of law so referred to and relied upon by the Applicant herein have not yet been determined by the Supreme Court of Appeal. Furthermore, this court and the parties herein, are not aware as to when the said appeal in the said case will be heard and determined. The justice of this case and the application herein demands that it be dealt with on its own peculiar facts. It would be unfair to the parties, most especially the Respondent, to grant a stay of the criminal proceedings in the court below, on the basis of an undetermined future occurrence. Moreover, section 42 of the Constitution provides that an accused person has a right to a speedy trial, and an accused, just like the State has no right to deliberately breach that constitutional provision, An order of stay in the circumstances of this case would be tantamount to breaching that constitutional provision. This court cannot be party to that.

I must further state that the Applicant has all the right to challenge admissibility of any evidence as the trial continues. That's the nature of any criminal trial, and the Applicant herein is ably legally represented.

All in all, on the facts and observations herein, it is the finding of this court that it would be unjust, and not in the interest of justice to grant a stay order in this matter. Consequently, the application for stay is hereby dismissed with costs for the Respondent.

MADE at the Supreme Court of Appeal, Blantyre this 23rd day of October 2024.



Justice S.A. Kalembera SC

JUSTICE OF APPEAL