REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL
MISCELLANEOUS CIVIL APPEAL NO. 04 OF 2026

(Being High Court, Commercial Division, Principal Registry, Commercial Case No. 301 of 2017)

BETWEEN:

ZOA TEA ESTATES LIMITED----------APPLICANT

AND

MAHMOOD CHAUNDRY AZHAR----------RESPONDENT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE SC JA

Kauka, Counsel for the Appellant

Njobvu D, Counsel for the Respondent

C. Fundani, Recording Officer

RULING

1. This matter came before me through a notice of motion for an order discharging leave to appeal out of time, alternatively for an order discharging order for stay of enforcement, alternatively for a formal declaration that the orders made herein on 3rd of February 2026 have expired by effluxion of time. The application is brought under section 23(2) of the Supreme Court of Appeal Act, Order III Rule 4 of the Supreme Court of Appeal Rules and the inherent jurisdiction of the court.

2. The application is supported by an affidavit made by Alinafe Kauka.

3. Before I further delve into the matter, let me refer to the chronology of events. On 3rd February 2026, the appellant through an ex-parte application obtained an order for an extension of time within which to file and serve a notice of appeal. The said order was as follows:

(i) Time for filing and service of the notice of appeal be and is hereby extended, and

(ii) The applicant shall within 14 days from the date of this order file and serve the notice of appeal on the respondent.

4. On 17th March 2026, the respondent filed this notice of motion. The gist of this application is that the appellant became aware of the decision against which it seeks to appeal to be heard as early as 28th November 2025 when the deponent called counsel Njobvu and informed him that the ruling had been delivered. That on 3rd December 2025, he made available to him a copy of the ruling. Counsel for the respondent therefore said that the appellant had suppressed material facts and misled the Court in paragraph 9 of the appellant's application filed on 19th January 2026 that the lawyers became aware of the decision in the second week of December 2025. The respondent produced WhatsApp messages (conversation between the two) during the period November 28 to December 2025.

5. The respondent says that when the appellant subsequently appeared before this Court and applied for the orders enlarging time within which to appeal and staying enforcement of the decision of the Court below, the appellant:

(i) did not provide security for costs.

(ii) did not provide good and substantial reasons for failure to appeal within the prescribed time.

(c) did not demonstrate that the appeal had reasonable or good prospects of success.

(d) did not demonstrate how the appeal, if successful, would be rendered nugatory unless its enforcement was stayed.

6. Having obtained the orders of 3rd February 2026, the appellant ignored the terms of that order, the appellant did not serve the notice of appeal within the time ordered.

7. On 7th April 2026, the respondent filed a supplementary affidavit in support of the motion filed on 17th March 2026. The gist of this affidavit is that the respondent would like to demonstrate that he is not impecunious. The respondent has listed down eight real properties that he owns in Blantyre and Lilongwe and has even attacked title/ownership documents.

8. Counsel Alinafe Kauka for the respondent further filed another supplementary affidavit in which he has attached exhibit MNC9.

9. On 13th April 2026, the appellant filed a notice of preliminary objection under paragraph 1(b) (i) and (iii) of Practice Direction Number 1 of 2010. The appellant also filed skeleton arguments in support of their application

10. In a nutshell, the appellant in the preliminary objection says that the respondent did not file and serve the skeleton arguments within 7 days from the date of filling the motion as required by Practice Direction Number 1 of 2010.

11. The appellant opposes this application. There is in place an affidavit in opposition made by Mr Davis Mthakati Njobvu counsel for the appellant.

12. Counsel Njobvu has deponed that on 28th of November 2025, Counsel Kauka called him on a barely audible WhatsApp line whilst in Zambia attending a Malawi Law Society meeting. On this day, Counsel Kauka did not inform him about the ruling delivered in the Court below.

13. When he returned from Zambia he heard that there was a ruling delivered by Alide J and he mentioned this fact to Kauka on 1st December 2025 after he noticed that Kauka was calling again. On that day, he had not yet seen the ruling.

14. On 3rd December 2025, Counsel Kauka sent him an application apparently to enforce the arbitration award. He could not make heads or tails of the application which he just skimmed through. Counsel Njobvu says that he regards WhatsApp as a social interaction tool and not for sending each other applications or discussing Court rulings. Counsel Njobvu said that it was unfortunate that having decided to engage him on WhatsApp informally, on documents which were not even filed with the Court, Mr Kauka would want to use the WhatsApp chats as evidence in respectable Court proceedings.

15. Counsel Njobvu said that they would only obtain instructions from the client and/or file an appeal after the recent ruling under appeal was received from the Court and sent to the client. That the process of trying to obtain instructions from the client was made harder by the fact that from mid December 2025 to January 2026, many people including themselves were on Christmas break. He also informed Kauka that his client had no email connectivity during the Christmas break as well as the fact that their contact person, Mrs Doram was unwell and subsequently admitted at Kabula SDA Hospital. All these matters were made known to Mr Kauka. Counsel Njobvu reiterated that there was no suppression of facts in the application made on the 17th February 2026.

16. Immediately after receiving instructions to appeal on 19th January 2026, we filed an application for leave to appeal out of time.

17. On 17th February 2026, the appellant filed and served a notice and grounds of appeal as shown in DMN1.

18. On 4th of March 2026, the respondent filed an application for an order setting aside stay in the Court below. The hearing of the said application was scheduled for 20th April 2026 as per exhibit DMN2.

19. Surprisingly the respondent made the present application on 17th March 2026 seeking similar reliefs like those that he is seeking in DMN2 above.

20. The appellant says that the present application/motion is incompetent because:

(i) It has been brought under wrong provisions of the law.

(ii) It has been brought in this Court when there is a similar application in the Court below.

(iii) It is tainted with falsehoods considering that the appellant already filed and served a notice and grounds of appeal; and

(iv) It has advanced no reasonable grounds necessitating the Court to grant reliefs sought.

21. On 15th April 2026, the respondent filed an affidavit in opposition to preliminary objection.

22. The respondent says that whilst the notice of motion was indeed issued on 19th of March 2026, the date of hearing was not signed contemporaneously. It was only on 30th March 2026 that I was informed of the date of hearing. Counsel Kauka tendered a WhatsApp communication from the Court showing that. On 2nd of April 2026 a messenger from their legal firm went to the Court and collected the documents. The date of hearing had not yet been fixed. On 9th April 2026, a messenger from their chamber went to the Court registry and got a copy which he photocopied before proceeding to effect service on the same day.

24. I have carefully considered all the documents that were filed with the Court. I have also considered all the submissions made by Counsel. Starting with the preliminary objection, it is clear that the respondent has conceded that there was no compliance with Practice Direction No 1 of 2010. The respondent in their skeleton arguments seems to have taken a very liberal and casual approach. Counsel said that the fact that the application was set down before skeleton arguments were filed quite obviously means that the Court decided not to exercise its discretion to dismiss the action. With due respect to Counsel, that is not correct. The fact that this issue was raised during hearing, means that it was still a live issue. There was no waiver by the Court at all.

25. I have also looked at the background information to the application herein. It is very clear that in arguing the case, the respondent had put so much reliance on the WhatsApp communication that was there between the appellant's Counsel and the respondent's Counsel. Most of that communication was initiated by the respondent's Counsel. A look at the evidence tendered on these WhatsApp exchanges, showed that you could not make heads or tail of what Counsel for the respondent was up to. At one point I had the irresistible impression that the WhatsApp communication was a deliberate trap on the appellant's Counsel. Moreover, the Court should have been the one communicating to the parties of the final ruling of the Court that was at the center of the matter. I have therefore kept out of my sight the WhatsApp messages and they are of no consequence.

26. I also noted that whilst the respondent was before this Court, the respondent was also pursuing a similar matter in the Court below. It would appear that the respondent was on a testing-testing expedition.

27. At the end of the day, I am satisfied that there was non compliance with Practice Direction No 1 of 2010 and this on its own is fatal. I also find that the respondent's application has got no legs on which to stand.

28. I therefore dismiss this application with costs.

Made in Chambers this 20th day of May 2026 at Blantyre

M.C.C. MKANDAWIRE SC

JUSTICE OF APPEAL