



**REPUBLIC OF MALAWI**

**IN THE SUPREME COURT OF APPEAL  
PRINCIPAL REGISTRY**

**MISCELLANEOUS CIVIL APPLICATION NO. 51 OF 2025**

**(BEING HIGH COURT OF MALAWI, COMMERCIAL DIVISION, LILONGWE  
REGISTRY, COMMERCIAL CAUSE NO. 133 OF 2020)**

**BETWEEN:**

**THE ADMINISTRATOR OF THE ESTATE  
OF ALFRED UPINDI (DECEASED) ..... 1ST APPLICANT**

**NANCY UPINDI ..... 2ND APPLICANT**

**AND**

**MICHAEL I.Y. KAFOTEKA .....1ST RESPONDENT**

**VIVO ENERGY MALAWI LIMITED ..... 2ND RESPONDENT**

**CORAM: The Hon. Justice F.E. Kapanda, SC, JA**

H. Mazambani, of Counsel for the Applicant

K. Mapemba, of Counsel for the Respondent

Minikwa, Court Clerk

**Date of hearing: 25 September 2025**

**Date of Judgment: 30 June 2026**

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## RULING

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(Application for a Stay of Enforcement and/or Execution of the High Court Judgment dated 2 September 2025 Pending Appeal)

### **Introduction**

This is an application by the Administrator of the Estate of Alfred Upindi, deceased, and Nancy Upindi for a stay of enforcement and execution of the judgment delivered by the High Court, Commercial Division, Lilongwe Registry, on 2 September 2025 in Commercial Cause No. 133 of 2020.

By that judgment, the High Court upheld the termination by the 1st Respondent, Michael I.Y. Kafoteka, of the sublease under which the Applicants occupied and operated Kafoteka Filling Station in Lilongwe. The judgment entitled the 1st Respondent to recover possession of the premises.

The Applicants have appealed against that decision. They first sought a stay in the High Court, but the application was dismissed. They now seek relief from this Court under section 7 of the Supreme Court of Appeal Act, Order I rule 18 of the Supreme Court of Appeal Rules, and the Court's inherent jurisdiction. Their purpose is to preserve the position pending the hearing and determination of the appeal.

The Respondents oppose the application. The question is whether the Applicants have shown sufficient grounds for the Court to suspend enforcement of a judgment in favour of the successful party while the appeal is pending.

### **Factual Background**

The dispute concerns the operation of Kafoteka Filling Station in Lilongwe and the contractual arrangements governing occupation of the site, its branding, and the supply of petroleum products. The 1st Respondent, Michael I.Y. Kafoteka, owns the premises. The Applicants, the Administrator of the Estate of Alfred Upindi, deceased, and Nancy Upindi, occupied and

operated the filling station as sublessees. Vivo Energy Malawi Limited, the 2nd Respondent in the court below, was the petroleum supplier involved in the franchise and retailer arrangements for the station.

The parties' relationship was governed by three connected agreements. The first was a grant of servitude in favour of the petroleum company then trading under the Caltex or Chevron brand. That arrangement required the station to trade exclusively under the relevant brand for the agreed period. The second was a twenty-five-year sublease granted by Mr Kafoteka to Alfred Upindi and Nancy Upindi, expressly subject to the grant of servitude and its terms. The third was a franchise or retailer agreement governing the supply and sale of petroleum products at the station.

The relationship broke down in 2019. By letter dated 25 July 2019, Vivo Energy introduced revised retailer-dealer policy terms, which the Applicants did not accept. In a letter of 16 August 2019, the Applicants purported to terminate the retailer or franchise arrangement and required Vivo Energy to remove its pumps and other equipment from the site within seven days. They later rebranded the station and began operating under a competitor's identity.

Mr Kafoteka regarded the termination of the franchise arrangement and the rebranding of the station as inconsistent with both the grant of servitude and the sublease. He contended that the Applicants had breached the contractual arrangements governing the premises and that he was therefore entitled to terminate the sublease. The Applicants denied any breach of covenant and disputed that the arrangements relied upon by the Respondents provided a lawful basis for termination.

Those events led to Commercial Cause No. 133 of 2020 in the Commercial Division of the High Court at Lilongwe. The Applicants challenged the termination, seeking declaratory relief and damages for loss of business. The Respondents defended the termination on the ground that the Applicants' conduct had fundamentally undermined the contractual relationship and the conditions on which the filling station had been subleased.

In its judgment of 2 September 2025, the High Court upheld Mr Kafoteka's termination of the sublease and rejected the Applicants' claim for loss-of-business damages. The result was that Mr Kafoteka became entitled to recover possession of the filling station.

The Applicants appealed. They had first applied to the High Court for a stay of execution, but that application was dismissed. Mr Kafoteka thereafter required them to hand over vacant possession of the filling station. The present application seeks a stay of enforcement and execution pending the hearing and determination of the appeal.

The Applicants say that immediate enforcement would end both their occupation of the site and their business, despite the several years said to remain under the sublease. They also contend that the introduction of another operator would make it difficult to restore them to

possession should the appeal succeed. The Respondents maintain that no basis has been shown for interfering with enforcement of the High Court judgment.

For present purposes, I have confined the evidence to the affidavits and annexures filed on this application. This is not an occasion to revisit the High Court's findings on the merits. The parties' affidavits nevertheless reveal material gaps and inconsistencies relevant to the application for a stay.

### **The Evidence**

This application falls to be decided primarily on the affidavit evidence and the documents exhibited to it. It is not a rehearing of the Commercial Cause, and the Court is not required at this stage to determine the validity of the termination of the sublease. The evidence matters only to the extent that it assists the Court to assess the practical consequences of granting or refusing a stay pending appeal.

### **The Applicants' Evidence**

The Applicants rely on the affidavit of Linda Upindi Kwenda. She states that the High Court upheld the 1st Respondent's termination of the sublease in its judgment of 2 September 2025. She further states that the Applicants have filed a Notice of Appeal and had first applied to the High Court for a stay, which was refused.

The Applicants also rely on the Respondents' demand for vacant possession. They say that the demand created an immediate risk of eviction before the stay application could be heard. There is, however, uncertainty in the dates. The affidavit refers to a letter dated 12 September 2025 requiring handover by 17 September 2025. The exhibited letter appears to be dated 9 September 2025 and requires the Applicants to wind up operations and deliver vacant possession by 16 September 2025, with the Respondents proposing to attend the site on 17 September 2025 for handover and inventory. The discrepancy does not alter the fact that possession was demanded, but it does affect the precision of the Applicants' account of urgency.

The Applicants state that they run a busy filling station and have medium- and long-term supply arrangements with fuel suppliers. They say that eviction would expose them to liability under those arrangements. No supply contracts, purchase orders, supplier correspondence, or comparable documents were exhibited to identify the suppliers, the duration of the commitments, or the financial consequences of early termination. The assertion is relevant, but it remains general and unsupported by primary evidence.

The Applicants also state that about seven years remain on the sublease. They contend that, if the Respondents take possession and install another operator, restoring the Applicants to the

premises may become difficult, inconvenient, or commercially impracticable even if the appeal succeeds. That is a genuine practical concern. It is not limited to lost income, since a new occupation or franchise arrangement may create interests that were not before the Court when judgment was given.

On financial loss, the Applicants state that the filling station generates gross revenue of about MK90,000,000 per quarter. They estimate that losses over the unexpired seven-year term could reach about MK2,000,000,000. They also state that rent is MK2,300,000 per quarter.

That evidence has significant limitations. The MK90,000,000 figure is said to be quarterly gross revenue, not net profit. Gross turnover cannot, without more, be treated as recoverable loss because it does not account for fuel costs, staff, utilities, taxes, finance, insurance, repairs, and other operating expenses. No books of account, bank statements, management accounts, audited accounts, fuel-purchase records, sales reports, or tax returns were produced to support the figure. Nor is the projected loss of about MK2,000,000,000 explained by any calculation or expert evidence. It is therefore an estimate, not proof of probable loss.

The Applicants further contend that the 1st Respondent would be unable to compensate them if the appeal succeeds. Their case rests largely on the fact that he had divorce proceedings, which they say reduced his net worth. They produced no judgment, consent order, settlement agreement, matrimonial-property inventory, or other evidence of the financial consequences of the divorce. The evidence establishes the fact of a divorce, but not that the 1st Respondent's means were materially diminished or that he could not satisfy a judgment.

### **The Respondents' Evidence**

The 1st Respondent, Mr Michael I.Y. Kafoteka, swore the affidavit in opposition. He disputes the claim that he lacks the means to meet any award that may ultimately be made in the Applicants' favour. He says that the Applicants were his tenants on property that he owns free of bank encumbrances.

To support that position, the 1st Respondent exhibited a valuation report for the filling station. His affidavit puts the value at more than MK3.5 billion as at 11 September 2025, while the Respondents' skeleton arguments refer to MK3.95 billion. The precise figure is therefore not entirely consistent across the Respondents' papers. Even so, the valuation is objective evidence that the 1st Respondent has an asset of substantial value.

The valuation does not, however, establish immediate liquidity or prove that the 1st Respondent could readily satisfy every substantial damages award. Asset value and ability to pay are related but distinct matters. His forecast that the property would appreciate to more than MK6 billion by 2033 is unsupported by valuation evidence and carries little weight.

The 1st Respondent also says that he will personally operate the station as a dealer for Vivo Energy Malawi Limited and will therefore have equal or better means to compensate the Applicants. There is no affidavit from Vivo Energy Malawi Limited, dealer agreement,

undertaking, financial statement, or other corporate evidence to support that assertion. It remains his assertion. The fact that Vivo Energy is named as a Respondent does not, by itself, establish that it has undertaken to satisfy any award made against the 1st Respondent.

The 1st Respondent accepts that he was divorced on 21 May 2024 and exhibits a divorce certificate. He denies that the filling station forms part of the matrimonial estate, stating that it was built by his late father in 1978 and passed to him before the marriage. He says there are other properties, vehicles, and assets available for distribution in the divorce proceedings. The divorce certificate proves only that the marriage was dissolved. Neither side has provided sufficient evidence to establish how the divorce affects the 1st Respondent's financial position.

The Respondents also say that the Applicants surrendered possession of the filling station on 18 September 2025. Mr Kafoteka alleges that the premises were handed over in a dilapidated condition and that two fuel pumps and electrical wiring had been removed. He says that he is engaging a contractor to repair the site and that the Respondents are now in occupation. There is no handover report, inventory, photographs, contractor's report, police report, or other independent evidence supporting the allegations about the condition of the premises or the removal of equipment. Those allegations cannot therefore be treated as established facts for the purpose of this application.

The alleged surrender of possession is nevertheless important. It means that the application is no longer simply about preventing an anticipated eviction. The question is whether the Court should preserve, restore, or otherwise protect the Applicants' position while the appeal is pending. That change in circumstances must be taken into account in deciding whether a stay would still serve a practical purpose.

### **Assessment of the Evidence**

The evidence clearly establishes that the High Court upheld termination of the sublease, that the Applicants appealed, that the High Court refused a stay, and that the Respondents took steps to recover possession. It also establishes that the Applicants' business is tied to this particular site and that a replacement operator could complicate restoration should the appeal succeed.

The Applicants' evidence is strongest on the risk that the appeal may lose practical value if the station is transferred to another operator before it is heard. It is much weaker on the amount and irreparability of the alleged financial loss. The claimed supplier commitments, turnover, profitability, and projected loss are not supported by contemporaneous business or accounting records.

The Respondents' evidence is strongest in showing that the 1st Respondent owns an asset of substantial value and that the Applicants' assertion of financial incapacity is insufficiently supported. It is less persuasive to the extent that it treats a valuation of a fixed asset as conclusive proof of ability to satisfy a future monetary award, or relies on unverified assertions

about the Applicants' surrender of the premises, the alleged removal of equipment, and Vivo Energy Malawi Limited's capacity to meet any judgment.

The evidence does not establish either party's financial position conclusively. The central question is not simply whether damages may be available. It is whether enforcement pending appeal would create a situation that could not be adequately reversed if the appeal succeeds, and whether that risk outweighs the prejudice of temporarily withholding the full benefit of the judgment from the Respondents.

### **Issues for Determination**

Having considered the motion, the supporting and opposing affidavits, and the parties' skeleton arguments, the following issues arise:

#### **Whether the application is properly before this Court**

The Respondents contend that the application is incompetent because it invokes Order 52.16(a) of the English Civil Procedure Rules 1998, which they say does not itself confer jurisdiction on this Court. They further argue that a stay application must rest on the correct legal provision and that an application brought under an inapplicable provision is liable to be dismissed in limine.

The Applicants rely not only on the English procedural provision, but also on section 7 of the Supreme Court of Appeal Act, Order I rule 18 of the Supreme Court of Appeal Rules, and the Court's inherent jurisdiction.

The first question is therefore whether, read as a whole, the motion identifies a sufficient jurisdictional basis for this Court to entertain an application for a stay pending appeal. That issue must be resolved before the merits are considered.

#### **Whether the intended appeal raises an arguable issue**

The Applicants have filed a Notice of Appeal against the judgment upholding the 1st Respondent's termination of the sublease. At this interlocutory stage, the Court is not required to decide whether the appeal will succeed. Nor should it undertake a detailed examination of the merits that would pre-empt the appeal hearing.

The inquiry is narrower: whether the appeal is genuine and raises a serious or arguable issue for the full Court. A stay does not follow merely because an appeal has been lodged. Equally, the Court should not refuse a stay simply because it cannot, at this stage, reach a final view on the merits.

**Whether refusal of a stay would create a real risk that the appeal will be rendered nugatory or cause injustice to the Applicants**

The Applicants say that enforcement will remove them from the filling station despite the several years said to remain under the sublease. They contend that the introduction of another operator would make restoration difficult if the appeal succeeds. They also rely on alleged business losses, existing supplier commitments, and the alleged inability of the Respondents to meet a future damages award.

The Respondents deny that the Applicants will suffer irreparable or uncompensable harm. They say that any loss is quantifiable in damages, that the Applicants have produced no accounts or other records to support the asserted level of business income, and that the 1st Respondent has sufficient assets to meet any award.

The issue is whether the evidence shows a real and substantial risk that refusal of a stay would deprive the appeal of practical value or expose the Applicants to an injustice that could not adequately be remedied if they ultimately succeed.

**Whether granting a stay would occasion disproportionate prejudice to the Respondents**

The Respondents succeeded in the High Court and are ordinarily entitled to the fruits of their judgment. They say that the Applicants have already surrendered possession and that the Respondents have resumed occupation. They further submit that a stay would delay their ability to operate or re-establish the filling station business.

The Court must therefore weigh the prejudice that a stay would cause the Respondents if the appeal fails against the risk to the Applicants if enforcement proceeds and the appeal later succeeds.

**Whether a stay, if justified, should be granted upon terms**

If a stay is justified, the Court must determine its form and conditions. It may impose terms designed to protect both sides, including continued payment of rent, preservation of the premises and equipment, restrictions on granting a fresh sublease or introducing another operator, security, or directions for the appeal to be prosecuted promptly.

The question is whether suitable terms can preserve the subject matter of the appeal without unfairly denying the Respondents the benefit of their judgment.

Although separately stated, these issues are closely connected. The central consideration is the risk of injustice to either party if a stay is granted or refused. The Court must first be satisfied that the application is competently before it. Once that is established, the remaining issues should not be treated mechanically as rigid and separate tests. They must be considered together in the exercise of the Court's discretion.

The Court is not being asked to decide the appeal or make definitive findings on the parties' disputed commercial claims. Its task is to decide whether the appeal needs protection from becoming practically worthless, while respecting the Respondents' entitlement to enforce the judgment in their favour. The appropriate order is the one that best serves the justice of the case pending the appeal.

## **Parties' Arguments**

### **The Applicants' Arguments**

The Applicants seek a stay of enforcement and execution of the High Court judgment of 2 September 2025 pending determination of their appeal. They submit that, having first sought and been refused a stay by the High Court, they are entitled to approach this Court.

They submit that the application is properly before this Court under section 7 of the Supreme Court of Appeal Act, Order I rule 18 of the Supreme Court of Appeal Rules, the Court's inherent jurisdiction, and the English procedural practice applicable through section 8 of the Act. They argue that the absence of a specific local rule governing stays pending appeal does not deprive the Court of jurisdiction to grant appropriate interim relief.

The Applicants further submit that their appeal raises substantial and arguable grounds concerning the legality and correctness of the High Court's decision to uphold the termination of the sublease. They say that the Court is not asked to decide the appeal now, but only to preserve the position until it is heard.

The Applicants' central contention is that refusing a stay would render the appeal practically nugatory. They say that they operated Kafoteka Filling Station under a sublease with about seven years remaining. In their submission, eviction and the introduction of another operator or tenant would make it difficult, if not impracticable, to restore them to occupation if the appeal succeeds.

They submit that the filling station is a going concern and that they have medium- and long-term commercial arrangements with fuel suppliers. Removal from the premises, they say, would expose them to contractual liabilities and business losses while the appeal is pending. They assert that the business generates about MK90,000,000 per quarter and that losses over the unexpired period of the sublease could approach MK2,000,000,000.

The Applicants also question the Respondents' ability to meet any damages award if the appeal succeeds. They rely on the 1st Respondent's divorce and contend that the division of matrimonial property may have weakened his financial position. They say that the risk extends beyond financial loss to the loss of a particular commercial site and the goodwill associated with the business.

On the balance of justice, the Applicants submit that a stay would preserve the status quo without unfair prejudice to the Respondents. They are willing to continue paying rent while the appeal is pending and undertake to vacate the premises if the appeal fails. They argue that the Respondents can still enjoy the benefit of the judgment after the appeal, whereas the Applicants may not be capable of being restored to their former position if enforcement proceeds immediately.

### **The Respondents' Arguments**

The Respondents oppose the application and first contend that it is incompetent. They argue that Order 52.16(a) of the English Civil Procedure Rules does not itself confer jurisdiction on this Court and that the Applicants must identify a proper local legal basis for the relief sought. In their submission, an application founded on an inapplicable provision is liable to be dismissed for want of jurisdiction.

On the merits, the Respondents submit that filing an appeal does not automatically entitle an unsuccessful litigant to a stay. They rely on the general rule that a successful party is entitled to the fruits of a judgment unless the applicant establishes special circumstances justifying departure from that position. The burden, they say, lies squarely on the Applicants to show by credible affidavit evidence that refusal of a stay would cause substantial injustice.

The Respondents submit that the Applicants have not discharged that burden. An assertion that the appeal has good prospects of success is not, without more, sufficient. The Court must consider the risk of injustice to both sides, including the prejudice caused to a successful litigant who is kept from the benefit of the judgment.

The Respondents further submit that the alleged business losses are speculative and quantifiable in damages. They challenge the claimed income and projected loss because no books of account, audited accounts, bank statements, sales records, or other financial documents were produced to establish the income alleged. They make the same point about the asserted contractual liabilities, since no supplier agreements or other supporting documents were exhibited.

On financial capacity, the 1st Respondent denies that he would be unable to satisfy any damages award. He says that he owns the filling station property free of bank encumbrances and relies on a valuation report showing substantial value. He further contends that the 2nd Respondent has moved to operate the station and that he will continue operating it as a dealer, thereby maintaining or improving his ability to meet any future liability.

The Respondents submit that the 1st Respondent's divorce does not establish an inability to pay. They say that the Applicants have produced no divorce settlement, court order, or evidence that the filling station forms part of the matrimonial estate or that the 1st Respondent's assets have been reduced to a level that would make him judgment proof.

The Respondents also argue that events have overtaken the application. They say that the Applicants surrendered possession on 18 September 2025 and that the Respondents are already in occupation. On that basis, they contend that the Applicants can no longer rely on a threatened eviction, particularly where execution has already occurred.

The Respondents add that the Applicants made no payment under the judgment and that no costs order was made against them. The usual concern about recovering money paid under a judgment therefore does not arise. If the appeal succeeds, they say, the Applicants' remedy would be compensatory damages or restoration of the balance of the unexpired sublease term, not a stay of a judgment already executed.

The Respondents accordingly submit that the Applicants have not shown special circumstances, irreparable prejudice, or a sufficient risk that the appeal will be rendered nugatory. They invite the Court to dismiss the application with costs.

### **Applicable Law and Analysis**

This is an application for a stay of enforcement and execution of the High Court judgment pending appeal. The Court's power to entertain it derives principally from section 7 of the Supreme Court of Appeal Act, Cap. 3:01. That provision permits a single member of the Court to exercise any power vested in the Court that does not involve hearing or determining the appeal itself. In civil matters, an order of a single member remains subject to variation, discharge, or reversal by the full Court.

Order I rule 18 of the Supreme Court of Appeal Rules, G.N. No. 283 of 1963, requires an applicant, where the relief may be obtained either in the court below or in this Court, first to apply to the court below. If that court refuses relief, the applicant may approach this Court. The Applicants complied with that requirement by first seeking a stay in the High Court.

Section 8 of the Supreme Court of Appeal Act is also relevant. Where neither the Act nor the Rules makes express provision for a civil procedural point, the Court is to be guided, as nearly as may be, by the law and practice then observed by the Court of Appeal in England. It is through section 8 that the parties refer to rule 52.16 of the Civil Procedure Rules 1998 of England. The rule reflects the ordinary position that an appeal does not itself operate as a stay; a stay follows only if the lower court or appellate court so orders.

The Respondents are correct that reference to the English Civil Procedure Rules does not itself confer jurisdiction on this Court. Rule 52.16 is procedural and cannot independently be the source of this Court's jurisdiction. But the application does not rest on that rule alone. It invokes section 7 of the Supreme Court of Appeal Act, Order I rule 18 of the Supreme Court of Appeal Rules, and the Court's procedural power under section 8. Its jurisdictional basis is therefore distinguishable from the earlier High Court application, which was dismissed because it relied

on section 23 of the Courts Act, a provision dealing with appeals from subordinate courts to the High Court.

The principles governing a stay are settled. A successful litigant should not ordinarily be deprived of the fruits of a judgment. In *City of Blantyre v Manda and Others* [1992] 15 MLR 114 (HC), the Court held that a successful party is prima facie entitled to enjoy the benefit of the judgment pending appeal. The Supreme Court of Appeal reaffirmed that principle in *Press Corporation Limited and Another v Cane Products Limited* [2005] MLR 377 (SCA), holding that the applicant bears the burden of showing special circumstances that justify departure from the ordinary rule.

Earlier authorities treated the risk that an appeal may be rendered nugatory, or that an appellant may suffer loss incapable of adequate compensation, as important indicators of special circumstances. That approach appears in *Nyasulu v Malawi Railways Limited*, cited by the Applicants as [1993] 16(1) MLR 394 (SCA), and reflects the reasoning in *The Annot Lyle* (1886) 11 PD 114, *Wilson v Church* (No. 2) (1879) 12 Ch D 454, and *Barker v Lavery* (1885) 14 QBD 769.

The modern approach is broader than a rigid inquiry into whether an appeal will be rendered nugatory. In *Mike Appel & Gatto Limited v Saulos Chilima* (Commercial Case No. 14 of 2012; MSCA Civil Appeal No. 20 of 2013) [2014] MWSC 5 (9 September 2014), this Court adopted the approach in *Hammond Suddard Solicitors v Agrichem International Holdings Limited* [2001] EWCA Civ 2065; [2002] 1 WLR 1255. The Court held that it must consider all the circumstances and decide what is just and expedient. The controlling question is the risk of injustice or prejudice to either party if a stay is granted or refused.

The same approach was applied in *Electricity Supply Corporation of Malawi v Samson Evance Kondowe t/a Saveman Investment* (MSCA Civil Appeal No. 67 of 2017) [2017] MWSC 8 (20 December 2017). The Court explained that the central inquiry is whether a stay would avert, or instead create, a real risk of injustice or prejudice to one or both parties. It also reaffirmed that the relevant risk must be proved by evidence. It is not enough to assert that the respondent will be unable to repay money or meet a damages award if the appeal succeeds.

Similarly, in *PUMA Energy (Malawi) Limited v Simama and Simso Oil and Transportation Company Limited* (MSCA Civil Appeal No. 19 of 2018) [2018] MWSC 12 (22 May 2018), the Court held that the decision whether to grant a stay must take account of the potential prejudice to both sides and the risk of injustice created by each alternative. The Court must therefore consider not only the appellant's claimed prejudice if enforcement proceeds, but also the prejudice to the successful respondent if enforcement is delayed.

In *Registrar of Financial Institutions v Mpinganjira and Five Others* (Miscellaneous Civil Appeal No. 4 of 2023) [2023] MWSC 13 (28 March 2023), the Court identified the usual considerations as whether there is a serious issue to be tried, whether the applicant will suffer irreparable harm if relief is refused, and whether the balance of convenience or justice favours

relief. These are not separate or inflexible hurdles. They are practical tools for answering the overarching question in *Mike Appel & Gatto Limited v Saulos Chilima* (Commercial Case No. 14 of 2012; MSCA Civil Appeal No. 20 of 2013) [2014] MWSC 5: where does the greater risk of injustice lie?

At this stage, the Court need not decide whether the appeal will succeed. It is enough to determine whether the appeal raises a genuine, non-frivolous issue and whether enforcement before it is determined may cause prejudice that cannot satisfactorily be corrected. The prospects of success may form part of the overall circumstances, but are not by themselves a basis for a stay: *Electricity Supply Corporation of Malawi v Samson Evance Kondowe t/a Saveman Investment* (MSCA Civil Appeal No. 67 of 2017) [2017] MWSC 8 (20 December 2017).

Where the alleged prejudice is purely financial, the applicant will ordinarily need cogent evidence that damages would not be an adequate remedy or that the respondent would be unable to meet an eventual award. That follows from *Electricity Supply Corporation of Malawi v Samson Evance Kondowe t/a Saveman Investment* (MSCA Civil Appeal No. 67 of 2017) [2017] MWSC 8 (20 December 2017) and *Contract Facilities Limited v Estate of Rees (Deceased) and Others* [2003] EWCA Civ 465, which emphasised the need for cogent evidence of a real risk of injustice before enforcement is restrained.

This case, however, concerns more than recovery of money under a judgment. The High Court upheld the termination of a sublease and enabled recovery of possession of an operating filling station. The relevant question is whether enforcement, particularly if it leads to another operator or a fresh commercial arrangement, may make it practically difficult to restore the Applicants to the premises if their appeal succeeds. That risk must be weighed against the Respondents' equally legitimate right to possession and to the fruits of the High Court judgment.

The Court must therefore assess the evidence on both sides. It must consider the Applicants' evidence on the unexpired term of the sublease, operation of the filling station, contractual commitments, and the practical difficulty of restoration. It must also consider the Respondents' case that the alleged losses are quantifiable, that possession has been surrendered, and that the 1st Respondent can meet a future award. The question is not whether either side can show a risk-free position. It is whether, in all the circumstances, justice requires temporary intervention pending the appeal.

The applicable principles can be stated briefly. An appeal does not operate as a stay. A stay is exceptional and discretionary. The Applicants bear the burden of showing, through credible affidavit evidence, a real risk of injustice if enforcement proceeds. The Court must then weigh that risk against the prejudice a stay would cause the Respondents as successful litigants. The order must be the one that is just and expedient in the circumstances of the case.

## **Determination of the Issues**

### **Whether the application is properly before this Court**

The Respondents' first objection is that the application is incompetent because it is expressed to be brought under Order 52.16 of the English Civil Procedure Rules 1998. They submit, correctly, that those Rules do not themselves confer jurisdiction on this Court. This Court's jurisdiction is derived from the Supreme Court of Appeal Act, not from an English procedural rule.

That objection, however, does not dispose of the application. Section 7 of the Supreme Court of Appeal Act empowers a single member of this Court to exercise any power vested in the Court that does not involve hearing or determining the appeal. In civil matters, section 8 provides that, where the Act and the Rules are silent on a matter of practice or procedure, the practice and procedure of the Court of Appeal in England applies as nearly as may be.

Order I rule 18 of the Supreme Court of Appeal Rules requires an applicant, where appropriate, first to seek relief in the court below. The Applicants did so. Their application for a stay was refused by the High Court before they approached this Court.

The reference in the motion to Order 52.16 of the English Civil Procedure Rules is therefore not advanced as an independent source of jurisdiction. It identifies the procedural rule applicable through section 8 of the Supreme Court of Appeal Act. The rule reflects the familiar position that an appeal does not operate as a stay unless the lower court or appellate court orders otherwise.

The Applicants have identified the judgment they seek to stay, the appeal for which the order is sought, and the relief requested. The Respondents had notice and answered the application fully on its merits. This is not a case of any mismatch between the relief sought and the legal framework invoked. The preliminary objection is dismissed.

### **Whether the appeal raises an arguable issue**

The Notice of Appeal challenges the finding that the 1st Respondent lawfully terminated the sublease. The Applicants contend, among other things, that they did not breach a covenant of the sublease; that the franchise agreement relied upon to justify termination was illegal and ineffective; that the alleged breakdown in the relationship was not a contractual ground for termination; and that the High Court should have upheld the agreed twenty-five-year term of the sublease.

Those grounds raise questions about the construction of the sublease and related agreements, the legal effect of the franchise arrangement, and the basis on which contractual termination could properly be sustained. They cannot properly be resolved on this interlocutory application.

It is enough to find that the appeal is neither frivolous nor merely dilatory. It raises issues that warrant consideration by the full Court. That conclusion is not an assessment of the appeal's prospects of success, which remain for the appeal itself.

**Whether refusal of a stay would render the appeal nugatory or occasion an injustice incapable of adequate remedy**

The Applicants say that enforcement of the judgment will cause substantial injustice. They rely on the approximately seven years said to remain under the sublease, the operation of a busy filling station from the premises, their medium- and long-term supplier obligations, and the possibility that another operator may be introduced, making restoration difficult if the appeal succeeds.

In an appropriate case, loss of possession of a particular commercial site may create a risk that cannot be fully captured by a simple monetary calculation. A replacement lease, the introduction of an independent third party, or competing contractual interests may complicate restoration and, depending on the evidence, may make an appeal practically ineffective.

The difficulty for the Applicants is that the alleged risk is not supported by sufficient evidence. They exhibited no supply contracts, correspondence, purchase commitments, accounts, bank statements, fuel-sales records, or other business records. The claimed income and projected loss are therefore unsupported estimates. Nor is there evidence that a new sublessee, tenant, or independent operator has been introduced or is about to be introduced.

More importantly, the Respondents state on affidavit that the Applicants surrendered possession on 18 September 2025 and that the Respondents resumed occupation. That assertion was not displaced by a further affidavit. A stay is ordinarily directed at suspending future enforcement. It is not ordinarily a remedy for undoing execution that has already occurred. Restoring possession would involve a different, mandatory form of relief, which the present motion neither expressly seeks nor supports with the necessary evidence.

The Applicants also say that the Respondents would be unable to compensate them if the appeal succeeds. That claim rests principally on the 1st Respondent's divorce and the suggestion that his net worth may have diminished. No order on the distribution of matrimonial property, statement of assets, or other financial evidence was produced to support the assertion.

The 1st Respondent, by contrast, has exhibited a valuation report showing that the filling station property has substantial value. The report does not establish immediate liquidity or conclusively prove capacity to satisfy every possible award. It does, however, materially

weaken the Applicants' bare assertion that he would be unable to meet a judgment. The Applicants bear the burden of showing a real risk of non-recovery. On the affidavit evidence before the Court, they have not discharged it.

I therefore find that the Applicants have not shown that refusal of a stay would render the appeal nugatory or expose them to a loss that could not adequately be addressed if the appeal succeeds.

### **Where the balance of justice lies**

The Respondents are successful litigants and are prima facie entitled to the benefit of the High Court judgment. They have already recovered possession of the premises. At this stage, a stay would not simply preserve the existing position. In substance, it would require the Court to interfere with execution already completed and would come close to ordering mandatory restoration of possession.

The Applicants' undertaking to continue paying rent is relevant, but it does not adequately address the prejudice to the Respondents of being kept from the use and operation of their premises after judgment. Nor have the Applicants offered security or other terms that would protect the Respondents against the risks of further delay.

If the Applicants succeed on appeal, their claimed loss can be addressed through appropriate appellate relief. The fact that a future assessment of loss may be complex does not, without more, justify depriving the successful party of the fruits of litigation.

Having weighed the competing risks of injustice, I find that the balance favours allowing the judgment to stand pending determination of the appeal.

**Disposition**

The application for a stay of enforcement and execution of the High Court judgment dated 2 September 2025 is dismissed.

The Applicants shall pay the Respondents' costs of this application.

**It is so ordered.**

Made in Chambers at Blantyre this 30th day of June 2026.

A handwritten signature in black ink, consisting of a vertical line with three loops at the top, resembling a stylized '3' or a cursive signature.

**JUSTICE F. E. KAPANDA SC, JA  
JUSTICE OF APPEAL**