



IN THE SUPREME COURT OF APPEAL
MISC CIVIL APPLICATION No. 37 OF 2026
(being High Court of Malawi, Civil Division, Lilongwe District Registry,
Land Cause No. 109 of 2023)

BETWEEN:

CECILIA LIYATI
ALEX LIYATI
JOSEPH LIYATI

1st APPELLANT
2nd APPELLANT
3rd APPELLANT

AND

T/A KHOMBEDZA
V.H. MTHAWANJI
SALIMA DISTRICT COUNCIL
ATTORNEY GENERAL
(MINISTRY OF EDUCATION & LOCAL GOVERNMENT)
USAID
BOAZEDIRCONSTRUCTION CO. LTD

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT
6th RESPONDENT

RULING

nyaKaunda Kamanga, JA

1. This matter comes before me as a single member of the Supreme Court of Appeal on an *ex parte* notice of motion brought by the Appellants pursuant to Section 7 of the Supreme Court of Appeal Act and Order I Rule 18 of the Supreme Court of Appeal Rules. The Appellants seek an order staying the enforcement or execution of the High Court order dated the 9th day of May, 2026, which dismissed the Appellants' civil action for want of jurisdiction. In support of the motion, the following documents have been filed: a certificate of extreme

urgency, an affidavit and skeleton arguments. The High Court dismissed the appellants' action after hearing the fourth Respondent (the Attorney General) and finding that the dispute should have been commenced before the Customary Land Tribunal in accordance with the Customary Land Act.

2. The historical genesis of this civil dispute lies in the ownership and occupation of a parcel of land known as Zagwazatha Estate No. 2, located at Mthawanji Village, Traditional Authority Khombedza in Salima District. The Appellants have occupied, possessed, used, and developed this disputed property for more than twenty years, operating under private leasehold titles (including leasehold documents, land rent notices from the Ministry of Lands, and general land rent receipts). In early 2022, a dispute arose when officials acting under the authority of the Ministry of Education (the fourth Respondent), in conjunction with USAID (the fifth Respondent) and Boazedirconstruction Company Limited (the 6th Respondent), entered upon a portion of the estate to construct Khote Khote Secondary School. This physical encroachment occurred without the consent, license, or authority of the Appellants.
3. Following failed discussions and a formal statutory demand notice served under Section 4 of the Civil Procedure (Suits by or Against the Government or Public Officers) Act, the Appellants commenced proceedings in the High Court. After proper personal service, the Respondents failed to enter an appearance or file any defense. Consequently, on the 6th day of November, 2023, the High Court entered a Default Judgment in favour of the Appellants, including an order of permanent injunction restraining all the Respondents from trespassing, developing, or possessing the said property. The Default Judgment remains valid and has never been vacated, set aside, or varied on its merits.
4. After the entry of the Default Judgment, the Fourth Respondent initiated settlement talks and subsequently applied to set aside the judgment. This culminated in an Agreed Order executed by the parties and signed on the 11th day of September, 2025. This Agreed Order was subject to a strict, express condition precedent: that the Fourth Respondent pay all costs thrown away, which were later assessed and demanded in the sum of MK 28,500,000.00. The Fourth Respondent failed and/or neglected to pay these costs. Due to this non-compliance, the Agreed Order was never perfected or implemented, and the attempt to set aside the Default Judgment and permanent injunction was aborted.

5. The Fourth Respondent applied to have the entire action dismissed for alleged lack of jurisdiction, asserting that the disputed estate was customary land. The application was heard on the 9th day of March, 2026, in the absence of the Appellants, although their legal practitioner had requested an adjournment due to logistical issues. The High Court dismissed the civil action. While the court below subsequently granted leave to appeal on the 12th day of May, 2026, it refused to suspend or stay the enforcement of its dismissal order of 9th March 2026, prompting the present application to this Court under its concurrent jurisdiction. The Supreme Court generally exercises concurrent jurisdiction only after the application has first been made in the lower court and refused. This requirement was emphasised in cases such as: *Chalimba t/a Krisken General Suppliers v Standard Bank PLC* (Misc. Civil Application 50 of 2022) [2023] MWSC 28 (22 December 2023); *Press Corporation Plc v Benard Nda and Others* (MSCA Miscellaneous Civil Application 42 of 2025) [2026] MWSC 4 (12 May 2026); *Hendrix Laher and Another v the Director of Public Prosecutions* (MSCA Miscellaneous Civil Application 35 of 2025) [2026] MWSC 3 (13 May 2026) and *Sardar v Bhayyat* (Miscellaneous Civil Application 34 of 2023) [2023] MWSC 44 (10 July 2023). Failure to follow this procedure can render the application incompetent.

6. The primary legal question to be determined is whether this Court should exercise its discretionary power under Section 7 of the Supreme Court of Appeal Act and Order I Rule 18 of the Supreme Court of Appeal Rules to stay the enforcement of the High Court's order of dismissal pending the hearing and determination of the substantive appeal.

7. Under the settled jurisprudence of this Court, the lodging of an appeal does not automatically operate as a stay of execution of the judgment or order of the court below. This fundamental principle is enshrined in Section 23 of the Courts Act. However, this Court possesses wide, unfettered discretionary power to grant a stay to preserve the subject matter of the litigation and ensure that the administration of justice is not defeated. As emphasised by the full bench of this Court in *Mike Appel & Gatto Ltd v Saulosi K Chilima and another* [2013] MLR 231 (SCA) and *Chichiri Shopping Centre Ltd v Ridgeview Investments* [2013] MLR 38 (SCA), the modern approach is to look holistically at all the facts of the case and base the decision on what is 'just' and 'expedient' in the circumstances, focusing on the 'risk of injustice' and 'prejudice' to either or both parties. In *Kadzipatike & Kamwera t/a KAM Building Contractors v Zhejiang Communications Construction Group Company Limited* (MSCA Misc. Civil Application no. 29 of 2023) [2023] MWSC 22 (14 July 2023), the Court stated

that the governing considerations include: the interests of justice; risk of the appeal being rendered nugatory; balance of convenience; and overall expediency of granting interim relief

8. Applying these principles to the facts in this case, this Court finds that the Appellants have demonstrated an exceptionally strong case for a stay. Regarding whether there is an arguable appeal, the Court finds that the appeal raises a profound and decisive jurisdictional and legal question. The High Court dismissed the action on the basis that the land is customary and within the exclusive purview of the Customary Land Tribunal. However, the record reveals that the Appellants contend to have documentary proof of private leasehold title (Zagwazatha Estate No. 2). However, the Fourth Respondent merely alleges through affidavits that the property is customary land. An appeal challenging a trial court's mischaracterisation of title and the court's refusal to exercise its constitutional jurisdiction is highly arguable, serious, and far from frivolous.
9. It is a long-established principle of law, dating back to the landmark English decision in *Wilson v. Church (No. 2)* (1879) 12 Ch D 454 and applied locally in *Nyasulu v Malawi Railways Ltd* [1993]16(1) MLR 394 (SCA), that the Appellants have to demonstrate a severe and irreversible risk that their appeal will be rendered entirely nugatory if a stay is refused. Where the subject matter of the dispute is land, the applicant must demonstrate its uniqueness and that its alteration, allocation, or development cannot be adequately compensated in damages: *Chitakale Plantations Co Ltd v Mary Woodworth and another (1)* [2010] MLR 57 (SCA); *Dyson Mkwapatira v. Malunga* (MSCA Misc. Civil Application no. 11 of 2025) (5 August 2025). If enforcement of the dismissal order proceeds, the land's physical status may be irreversibly altered. The Respondents, or third parties at their invitation, may proceed to develop, occupy, allocate, subdivide, or transfer the land under the guise of customary tenure. Such actions would create an irreversible situation, rendering any eventual success by the Appellants on appeal academic and without any practical effect. As noted in *Kanyuka v Chiumia and others*, High Court of Malawi, Principal Registry, Civil Cause 58 of 2003 (31 January 2003), it is always wiser to delay new activity rather than risk destroying or damaging an established right.
10. The balance of convenience and the interests of justice overwhelmingly favour preserving the status quo. The Respondents will not suffer prejudice if development on the disputed portion is suspended until the legal ownership of the land is resolved. However, the Appellants stand to suffer immense,

irreversible constitutional and proprietary prejudice if their leasehold is carved up under a mistaken jurisdictional premise.

11. Courts traditionally treat land as unique property. Unlike an ordinary money judgment, land cannot always be adequately compensated by damages. Where ownership, title, possession, occupation, or development of land is in dispute, preservation of the property pending appeal becomes especially important. The reasoning is similar to the approach taken in the recent *Mkwapatira* case, where this Court sustained a stay because developments were taking place on disputed land and continuation of those developments could prejudice the applicant's rights before the appeal was determined.
12. Consequently, this Court, in the exercise of its discretion, determines that the enforcement, execution, and implementation of the order of the High Court dismissing the action, dated the 9th day of March, 2026, and the order denying suspension, dated the 12th day of May, 2026, be and are hereby **STAYED** and **SUSPENDED** pending the final hearing and determination of the appeal herein.
13. To expedite the appeal process, the Appellants shall file a summons for the settlement of the record of appeal in the High Court within fourteen (14) days from the date of service of this order on the Respondents.
14. The costs of this application shall be in the cause.

DATED and DELIVERED at Blantyre this 28th day of August 2026.



Dorothy nyaKaunda Kamanga, SC
JUSTICE OF APPEAL

Mr. P J Maulidi
Mr. Chinkono

Counsel for the Appellant
Law Clerk