

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 3478 OF 2006**

BETWEEN:

W. O. BAPUPLAINTIFF

- AND -

**MAHAFUZUR RAMONI1ST DEFENDANT/APPLICANT
IBRAHIM MAHOMED BADAT.....2ND DEFENDANT/APPLICANT**

CORAM: HONOURABLE JUSTICE KAMWAMBE

Mr E Banda of counsel for the Plaintiff

Mr Kasambara of Counsel for the Defendant/Applicant

Mr Rhodani Official Interpreter

RULING

Kamwambe, J

This is an application by the 1st and 2nd Defendants for summons to set aside court order of attachment of property under Order VIII of the Rules of the High Court on the following grounds:-

1. that the Defendants are not in possession or custody of the plaintiff's property;
2. that damages would be adequate remedy to the plaintiff;
3. that there are no reasonable grounds for the attachment of property of the Defendants;

4. and that the plaintiff misrepresented facts to the court at the ex-parte hearing of the application for attachment of property.

Through an ex-parte application this court granted an order of attachment of property dated 13th February, 2007. The order itemized the properties as follows:-

- i. 2 x 2 Tonne per hour maize mill with motor , starter and frame
- ii. 1 x 1 Tonne per hour maize mill with motor, starter and frame
- iii. Any other chattel currently in custody of the defendants.

It was further ordered that the chattels so attached may be removed from the premises where the chattels currently are and be preserved accordingly.

The first contention by the defendants is that the application for attachment of property having been made under Order VIII Rules of the High Court the Order is not applicable since it applies where property to be attached is defendants' property, whereas here, it is plaintiff's property. It is needful that I quote the order which goes as follows:-

“1(1) If the court, after issue of a writ, is satisfied that a plaintiff has a good cause of action and that the defendant, with intent to defeat or delay the claim of the plaintiff, has absconded or left Malawi, or is about to do so, or has disposed of or removed or concealed or made away with or handed over to others any of his property, or is about to do so, or has...the court may-

- (b) **order that attachment issue against the defendant's property** in all respects as if he were a judgment debtor, save and except that any property seized shall not be sold prior to judgment, unless subject to rapid decay or deterioration, or by leave of the court”.
(my underlining)

In paragraph 2 of the affidavit in opposition to setting aside order for attachment the deponent, Edwin Banda states as follows:-

“THAT I made an application for attachment of property of the plaintiff and not of the defendants. The application was supported by the affidavit of W.O. Bapu, which shall also be used in the present application”.

This is exactly what the defendants are contending that Order VIII applies where the property belongs to the defendant; and not the plaintiff. Counsel for the plaintiff argues that since the defendants claim the property to be theirs, therefore, for the purposes of Order VIII it should be considered as defendants' property. I do not intend to buy this argument which serves the plaintiff both ways in that he claims the property to be his and on the other hand for the purposes of Order VIII he concedes or allows it that the property belongs to the defendants. The plaintiff must adopt one stand, either it is his property which he is claiming from the defendants or it is defendants' property which he intends to be attached. I say so because in this matter, in whose ownership the property is, is crucial from the outset. So, if the plaintiff turns around to say that it is defendants' property then he should not at the same time claim ownership of the same.

In view of what I have said above, since the plaintiff claims the property to be his, Order VIII of the Rules of the High Court is certainly not the proper authority under which he could have made his application. Instead it should have been made, as counsel for the defendants observed, under Order 29/2 of the Rules of the Supreme Court for preservation of the subject matter. I therefore make a finding that it was an error to make an order of attachment of property on the wrong law.

When the question of ownership is at issue, such as where plaintiff says it is his property and on the other hand the defendant also claims the property to be his as is the case in here, then the safer way to proceed is to apply under Order 29/2 Rules of the Supreme Court for preservation of the property. Likewise if ownership of property is not at issue, and that the property belongs to the plaintiff then Order 29/2 Rules of the Supreme Court should apply. On the other hand, if the

ownership is not at issue and the property belongs to the defendant, then the plaintiff can safely proceed under Order VIII of the Rules of the High court, however, he may also proceed under Order 29/2 Rules of the Supreme Court.

Not to be seen to have not appreciated the facts fully, let me say that the defendants cannot, in the same vein insist that the property belongs to the plaintiff and that therefore Order VIII of the Rules of the High Court is not applicable when at the same time in their affidavit they contend that the property is theirs after purchasing it in good faith. This would be unfair to the plaintiff. I may therefore see good reason for the plaintiff to say that for the purposes of this application the property belongs to the defendants since the defendants say so.

The defendants also question the nature of the order in that on its third limb it attaches “Any other chattel currently in custody of the defendants” which is too general. This third limb is too general and wide in that it should not have been there. Property to be so attached must be specific and identifiable so that he who is executing knows what he is going for. It is thus deleted from the Order.

In the light of the above, the courts jurisdiction is nevertheless discretionary and exercise of such discretion must be done judicially. If this application came under Order 29/2 of the Rules of the Supreme Court I would have granted the application for preservation of the property despite the fact that damages would be an adequate remedy, so as to prevent the property being removed or sold or dealt with otherwise. I do not think that in the circumstances it would be prudent for me to order that the order be set aside and a fresh application under Order 29/2 be made. With regard to the peculiar circumstances of this case and that the applicant would suffer no prejudice I decide not to grant the application to set aside the order and it is so decided. (See Order 2/0/2 Rules of the Supreme Court which says that non compliance of these rules shall not render any proceedings void unless the court directs so). This is an amended order.

Made in Chambers this 19th day of March 2007 at Blantyre.

M L Kamwambe

JUDGE