

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 1110 OF 2005

BETWEEN

MACDONALD CHAPOLA..... PLAINTIFF

AND

UNITED GENERAL INSURANCE CO. 1ST DEFENDANT

WORLD VISION INTERNATIONAL 2ND DEFENDANT

CORAM : HON JUSTICE NYIRENDA

: Mrs. Ottober, Counsel for the Plaintiff

: Mr. Chilenga, Counsel for the Defendant

JUDGMENT

The appellants in this matter are the two defendants who seek to challenge the Order of Execution and incidental fees and expenses following the Order of the Senior Deputy Registrar given on the 10th November 2006.

The back ground facts are brief. The Senior Deputy Registrar found for the plaintiff in negligence summarily and on admission by the defendant. The plaintiff sought further damages for loss of use of his vehicle which were assessed before the Senior Deputy Registrar and a sum of K1,513,000.00 was awarded in the plaintiff's favour. This was on the 4th May 2006. Being dissatisfied with the

assessment the defendants filed a notice of appeal on the 22nd May 2006. In the meantime the plaintiff was pressing for the payment which was not forthcoming. The defendants sought a bit of time.

On the 6th of June 2006 the plaintiff took out a Writ of *feri facias* to recover the sum adjudged. On that same day the defendants made payment into Court and issued the plaintiff with a notice of payment into Court. The Notice of Payment Into Court reads “Take Notice that the Defendants hereby pay the sum of K1,513,000.00 into Court pending the hearing of an appeal herein”. The defendants then went on to seek Stay of Execution pending the hearing of the appeal.

On 8th June 2006 stay of execution was granted but the Senior Deputy Registrar ordered the Defendants to pay sheriff fees and Expenses. It is against the Order for Sheriff fees and expenses that this appeal is directed. In this regard the defendants seek determination of the following issues:

1. Whether the Respondent had a right to execute the judgments after having been served with a Notice of Payment Into Court on 6th June, 2006 and accepted on their behalf by Mr. Mwale, Counsel for the Respondent and therefore that the Respondent filed a Writ of *Fifa* with the knowledge of the Payment Into Court.
2. Whether the Sheriff levied any execution at all in the matter when the Court only ordered payment out of Court on 9th June 2006.
3. Whether execution was necessary when the money was already in Court.

4. Whether the Appellants are entitled to a refund of Sheriff fees and expenses on the irregular execution.

Both Counsel are very passionate about this matter and have submitted accordingly with Counsel for the respondent arguing that the payment into court was wrongful and therefore that there was nothing irregular about the execution of the Court Order of the 4th May 2006.

The defendants submit that The payment into court was pursuant to Order 22 rule 1 and they emphasize that a defendant may at any time pay into Court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims. Order 22 r 1 provides as follows:

“In any action for a debt or damages any defendant may at any time pay into Court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims ---“

It is to the interpretation and application of this Order in the context of the circumstances of this case that I should address my mind. The editorial introduction to Order 22 identifies four main provisions that delineate the Order. These are rules 1, 3, 7 and 14 of the Order.

Rule 1 draws attention and states that the rule is applicable in any action for a debt or damages and that the defendant may make a voluntary payment in satisfaction of the cause of action. It is pointed out that the expression “*payment*

into court” is used in another quite different context where a defendant is ordered to pay money into Court as a condition for being granted leave to defend on a plaintiff’s application for summary judgment under Order 14. Rule 3 contains provisions concerning the acceptance of money paid into Court. Rule 7 shall be quoted for its importance. It states:

Except in an action to which a defense of tender before action is pleaded, and except in an action in which all further proceedings are stayed by virtue of rule 3(4) after the trial or hearing has begun, and subject to paragraph (2) the fact that money has been paid into Court under the foregoing provisions of this Order shall not be pleaded and no communication of that fact shall be made to the Court at the trial or hearing of the action or counter claim or of any question or issue as to the debt or damages until all questions of liability and of the amount of the debt or damages have been decided.

In the editorial introduction rule 7 is described as “*for the obvious reasons*” that is the trial Court should not be aware of the payment to avoid the Court being prejudiced by the fact of payment in its final determination of the matter.

The scheme of Order 22 is aimed at minimizing costs of litigation. The introductory remarks to the Order state that the rule directing the Court as to the manner in which it should exercise its discretion as to costs endeavour to encourage the settlement of proceedings. In particular, these rules (Order 22 rules) provide a means by which a party defending a claim may, in certain

circumstances, by making an offer, minimize his exposure to liability for his opponent's costs under the ordinary costs rules.

The point that has been taken up by the defendants is that they were entitled to make payment into Court at any time. In so far as the defendants are concerned "*at any time*" simply means "*at any time indeed*". I will not waste time and say the defendants have gotten it all wrong. Payment into Court under Order 22 is in satisfaction of the cause of action and not in satisfaction of liability. That is why any payment into Court under this Order is kept away from the trial judge. The only exception is in cases of interlocutory judgments and in this regard Order 22/1/8 provides that a payment into Court may be made after an interlocutory judgment has been entered for damages to be assessed, and such payment in should be made not less than 21 days before the trial of the assessment of damages. Clearly therefore payment into Court under this Order is not in satisfaction of a perfected judgment. Order 22/7/4 defining the phrase "*until all questions of liability*" says the rule contemplates communications of the fact of payment into Court and the amount thereof before the judgment is perfected by entry, for it assumes that the trial judge will be told about the payment in, for purposes of the order as to costs.

The payment made in the instant case was not pursuant to Order 22. As a matter of fact Order 22/7/5 says the fact that a payment into Court has been made in the proceedings in the Court below before judgment or the amount of any such payment must not be stated in the notice of appeal or the respondent's notice or in any supplementary notice and must not be communicated to the Court of

Appeal until all questions relating to liability for the debt, damages or salvage claimed or the amount therein have been decided. What was a secret plea so far as the trial judge is concerned has become a secret plea so far as the Court of Appeal is concerned. Payment into Court therefore is a secret payment and therefore obviously can not be a payment in compliance with a final judgment of a subordinate Court or an Appellate Court.

The defendants have advanced another argument before this Court which was not before the Registrar and is not in their grounds of appeal. I will deal with it nonetheless. It is said that as a matter of fact the Sheriff did not levy execution. That there is nothing that the Sheriff did to entitle him to any fees. This argument can briefly be dealt with. The defendants are simply asserting wrong and perhaps misleading facts.

Assistant Sheriff, Wadi made a written report on his exercise on the 8th June 2006 which is on record. The report states as follows:

I visited the defendant on 8th June 2006 and demanded payment. They informed me that they paid money to the High Court because they want to appeal. I contacted the plaintiff's lawyer who instructed me to execute the warrant and I seized motor vehicle Registration No. BM 5545, Nissan D/Cub. While I was moving the vehicle the defendant's lawyer served me with an Order to stay execution and that fees and expenses be paid by the plaintiff.

The fact of the matter therefore is that there was execution. Not simply walk in possession; the Assistant Sheriff was actually moving the vehicle until he was prevented by the defendants' Counsel. Now that my conclusion is that the payment into court was completely irregular it means there was nothing irregular about the execution and therefore that the defendants must be condemned in Sheriff fees and incidental costs.

I therefore uphold the ruling of the Senior Deputy Registrar and dismiss this appeal with costs for the plaintiff.

MADE at Lilongwe this 6th day of June 2008.

A.K.C. Nyirenda

J U D G E