



IN THE HIGH COURT OF MALAWI

(COMMERCIAL DIVISION)

LILONGWE REGISTRY

**COMMERCIAL CASE NO. 78C OF 2020
(BEFORE HONOURABLE JUSTICE MALONDA)
BETWEEN:**

**McDONALD KAMWERA t/a KM BUILDING CONTRACTORSCLAIMANT
AND
ZHEJIANG COMMUNICATIONS CONSTRUCTION GROUP
COMPANY.....DEFENDANT**

Coram: Hon. Justice Charlotte Wezi Mesikano Malonda

Mr. Kadzipatike, Counsel for the Claimant

Mr. Sitima, Counsel for the Defendant

Sellah Nyirenda, Court Clerk

**RULING ON APPLICATION FOR REVIEW OF ORDER ON ASSESSMENT OF COSTS,
RULING ON APPLICATION TO SET ASIDE ORDER GRANTING LEAVE TO SELL
PROPERTY BY PRIVATE TREATY AND ORDER SETTING ASIDE SALE**

1. These are two separate applications, which were argued by the parties in one hearing. As part of active case management, this Court shall dispose of these matters in seriatim.
2. The first application is for the review of an assessment of costs, and the second application is to set aside an order granting leave to sell of property by private treaty.
3. The Order for review of costs is based on the Assessment of Costs Order of 10th March 2022.

Background

4. There was a contractual dispute between the parties out of which the claimant sued for MK13,000,000.00. The claim was settled through Consent after undergoing

mediation with this Court. The Settlement agreement referred the parties to the Assistant Registrar for assessment.

5. The assessment ruling dated 13th January 2022 found that the sum MK13,000,000.00 was owing and interest payable was calculated at MK35,541,831.27. In total the Defendant owed the Claimant MK48,541,831.27. The Defendant has appealed to the Supreme Court the said ruling on assessment of damages.
6. The parties further went for assessment of costs and the Court delivered a ruling on 10th March 2022 awarding the Claimant MK23,952,310.00 as legal costs.
7. The current dispute and twin applications are based on the following enumeration of events surrounding realization of the judgement sum of MK48,541,831.27 by the Claimant.
8. On 31st January 2022, 18 days after the ruling of the court on damages, the Claimant filed an ex-parte sale and seizure order for the judgement sum of MK48,541,831.27. The Court granted this Order.
9. Around or between 4th and 7th February 2022, barely 4 days later, the Sheriff executed the Order and impounded 3 tippers and a Ford Ranger from the Defendant's site in Mzuzu. On 20th February 2022, the sheriff went again, through one Mr Nyirenda, went again and seized another tipper from the defendant. My suspicion is that the additional seizure of the additional vehicle was triggered by something, which has not been placed on record.
10. On 31st January 2022, the Claimant (now the Judgement Creditor) applied and was granted an Interim third party Debt Order for the Sum MK51,541,831.27, pending an inter parties application on 28th February 2022. This meant that the Defendant's known accounts were frozen.
11. The Defendant depones that total value of the seized vehicles is MK192,603,397.62. The details and values of the seized vehicles were as follows:

TYPE	REG NUMBER	CHASIS NUMBER	YEAR OF MAKE	VALUE
Tipper	KA8027	LZGJLDR41HX050538	2017	MK41,276,631.75
Tipper	KA8031	LZGJLDR48HX050536	2017	MK41,276,631.75
Tipper	KA9280	LZGJLBM4XHG012334	2017	MK30,635.067.06
Tipper	KA9482	LZGJLBM43HG012336	2017	MK30,635.067.06
Ford Ranger	KA8073	6FPPXXMJ2PHA01881	2017	USD 60000

12. On 10th of February 2022, the Court set down for hearing the assessment for costs.

13. Meanwhile, 7 days later, on 17th February 2022, the Claimant applied ex-parte and was granted leave to sell privately the moveable property seized under the warrant. The Order was worded and follows:

"IT IS HEREBY ORDERED AND DIRECTED that leave be granted to the Claimant through Counsel sell the FOUR tippers and FORD ranger seized by the sheriff ...to satisfy the judgement debt herein plus any costs incurred in the execution of the Order"

14. This Order was granted purportedly under **Section 16(2)** as read with **Section 15(1)** of the Sheriffs Act. I will explain the provisions of the two sections in the subsequent paragraphs.
15. I have gone over the application to sale by private treaty several times, and the only reason given for such a quick sale was that ten days had lapsed and the Defendant had not paid the Judgement sum.
16. It is the Defendant's submission that, the Claimant proceeded to obtain possession of the vehicles from the Sheriff and dispose of the 5 vehicles by private treaty. It is not clear of the actual dates the Claimant's counsel, Mr Kadzipatike, sold the vehicles to other third parties. However, on 21st February 2022, 17 days after 4 vehicles were seized, and 1 day after an additional tipper was seized, the Defendant contacted the Sheriff to redeem the vehicles and pay the Judgement sum, only to be informed that the seized property was already sold by Mr Kadzipatike.
17. Up to today, no report has been provided by the Claimant nor Mr Kadzipatike on the proceeds of sale. No report has also been provided by the Sheriff's office on the proceeds of sale.
18. The drama does not end there. On the 9th of March 2022, the Defendant was approached by the Sheriff again through Mr Nyirenda with regards to the Judgement Order for legal costs. The Sheriff was now demanding a further MK65,000,000.00 from the Defendant, failing which the sheriff threatened to execute again for that amount.
19. Suspiciously, this demand was made before the Order for Costs had been made by the Court. Upon further inquiry, by coincidence, the Court delivered on 10th March 2022 an Order on Costs awarding the Claimant MK23,952,310.00. This means the Order of the Court was delivered a day after the Sheriff had already called the Defendant to pay the Judgement sum. In essence, the Sheriff's office pre-empted the Court Order. They jumped the gun. The Court Order of 10th March 2022, awarded a sum of MK23,952,310.00, which is MK40,000,000.00 lower than the amount demanded from the Defendant.
20. On record, there was no warrant for the same, yet the Sheriff was demanding a higher amount, in the absence of an accompanying Court Order. The Defendant has filed a complaint with the Anti-Corruption Bureau against the Conduct of the Sheriff's officer.

21. As for the Assessment of Costs, the Defendant has appealed the Assistant Registrar's decision for correction of Judgement dated 7th September 2022. However, the Defendant has applied for this Court to review the Assessment Order of 10th March 2022.

ISSUES IN DISPUTE

22. The contention in this court is to determine the legality of the disposal of the Defendants property by Private treaty or otherwise to satisfy a judgement debt.
23. The other issue in contention is to review the Order for costs based on several grounds.

LAW

24. I appreciate that I have an opportunity to benefit from both statute and case law on the issues in dispute. I have also read the sworn statements in support and opposition to both applications.
25. Dealing with the issue of the ***Sheriffs Act, section 16 (2) and 15(1)*** provides the following:

Section 16

Sales under execution to be published unless otherwise ordered

(2) Where any property is seized in execution and the court has notice of another execution or other executions, the court shall not consider an application for leave to sell privately until the prescribed notice has been given to the other execution creditor or creditors, who may appear before the court and be heard on the application

Section 15

Period to elapse before sale

(1) No movable property seized in execution under process of a court shall be sold for the purpose of satisfying the warrant of execution until the expiration of a period of at least ten days next following the day on which the property has been so seized unless- (a) the property is of a perishable nature; or (b) the person whose property has been seized so requests in writing:

Provided that-

(a) the Sheriff may, if he is unable from want of time to complete the sale, adjourn the same for a period of not more than three days, and so on as often as may be necessary; (b) the court may, if it thinks it, direct that the sale shall be postponed for any time not exceeding twenty-eight days after the seizure

APPLICATION OF LAW TO THE FACTS

26. The claimant adopted his sworn statement and presented oral arguments. The Defendants did not attend the final hearing. However, he had filed and argued parts of the application.
27. I will consider all issues and arguments raised both orally and in the pleadings.

28. Firstly, I have decided not to proceed to review Assessment for costs of the Order of 10th March 2022. This is because the Defendant has appealed to the Supreme Court against the decision of the Assistant Registrar of 7th September 2022. The Order of 10th March 2022 and 7th September 2022 are related, because the prior Order resulted from the application to correct the former Order. It is my belief that the outcome of the MSCA case shall inform the review of the Order made on 10th March 2022. Should this Court proceed to review the Order made on 10th March 2022, it would undermine the appeal process and even the outcome, which may be unjust to the litigants. I, therefore, will not review the Assessment of Costs Order dated 10th March 2022, on that ground alone.
29. I will now move on to determine the issue of sale of defendants seized property by private treaty or otherwise.
30. The Defendant has submitted that the sale by private treaty should be set aside based on irregularities surrounding the granting of the Order, and the irregularity in which the sale was conducted.
31. From the onset, it is my view that according to the law, the ten-day period for sell of the property only applies if the sheriff is selling the property himself. It does not apply when anyone, other than the sheriff is disposing of the property, especially through private treaty.
32. I have gone through the Claimant's opposition against this application. Their version of the story is that, much as they obtained an Order to sell by private treaty, they did not use it, nor did they serve it on the Defendant nor the Sheriff. Their position is that it is the Sheriff alone who sold the property under the Seizure and Sale Order.
33. The Claimant insists that he waived his right to use the Order to sale by private treaty, and the sale of the property was done through a public auction, due to the expiry of the 14 days given by the Court Order of 13th January 2022, to fulfill the Judgment debt.
34. The Claimant has also argued that the current application is an attempt to re-open the statutory periods given to the Sheriff to sell seized property, and further that the Defendant is suing the wrong party. Hence implying that the Sheriff should have been added as a party.
35. The Claimant relied on the sworn statements of Mr Kadzipatike, Ms Jean Kaunda (one of the people who purchased a tipper) , and Mr Victor Nyirenda (Assistant Sheriff , in Mzuzu office) . Whilst the Defendant relied on the sworn statement of Bella Liu and Mr Sitima.
36. Both parties applied and were granted leave to cross-examine each other's deponents. However, only the Defendant availed his deponents for cross-examination.

37. In the absence of the Claimants deponents to avail themselves for cross-examination, this Court directed their evidence, given through sworn statements to be none admissible as it put the claimants at an added advantage over the Defendants, due to failure to test the evidence given through sworn statement. I therefore excluded evidence that could not be cross-examined, See **Order 17 rule 2**.

1.—(1) *The Court shall control evidence in a proceeding by giving directions in relation to:*

(a) the issues on which it requires evidence;

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence shall be placed before the Court.

(2) The Court may use its power under this Order to exclude evidence that would otherwise be admissible.

(3) The Court may limit cross-examination.

2.—(1) Subject to sub rule (2), any fact which needs to be proved by the evidence of a witness shall be proved—:

(a) at trial, by his oral evidence given in public; and

(b) at any other hearing, by his evidence in writing

38. It is clear from the submissions that the parties are providing contradicting information as to what happened after the property was seized by the Sheriff in February 2022. All the facts prior to the seizure and sale are not disputed.

39. This has made me curious to understand the timeline of events, which I have outlined above.

40. I am inclined to believe the Defendant's version of events because based on the information before me, the evidence is consistent and credible. I have further believed them for reasons provided in my explanation in the subsequent paragraphs.

41. The Defendant, on 21st February 2022, 17 days after the vehicles were seized, and one day after an additional tipper had been seized, contacted the Sheriff to redeem the vehicles and pay the Judgement sum, only to be informed that the seized property was already sold by Mr Kadzipatike. Up to today, no report has been provided by the Claimant nor Mr Kadzipatike on the proceeds of sale. If the sheriff had indeed sold the vehicles by Public auction as asserted by the Claimant, it is him, who was supposed to bring the Sheriff's report. I wonder why the Claimant did not provide proof that the vehicles had been sold at a public auction?

42. The legal argument the Claimant has relied on, is the issue of burden of proof, *Ei qui affirmat non qui negat incumbit probatio*. See **Constantine Line v Imperial Smelting Corporation (1943) A.C.154**. It is the claimant's argument that the

Defendant has provided no evidence to support the claims that, it is the claimant who sold the defendants seized property.

43. The claimant asserts that this evidence should have been brought by the Defendant. However, the defendant, understandably so, has no proof with regards to the sheriff's involvement in the sale, because their submission is that the Claimants Lawyer, Mr Kadzipatike is the one who prevailed over the sale of the seized assets. **See** Sworn statement of Mr Sitima and Ms Bella Liu. Further to that, it is deponed by Mr Sitima (sworn statement paragraph 7) that, Mr Kadzipatike himself confirmed that he has sold the vehicles by private treaty and the sheriff was not involved in the sale.
44. Had it been that the sheriff was involved in the sale of the seized assets, in compliance with **Section 16(1)**, the sale ought to have been publicly advertised, and the proceeds of such sale paid into court, **see Order 28 rule 9(2)**. None of the above took place.
45. The explanation that the vehicles were sold privately corroborates the Court Order granted to sell the vehicles by private treaty through the Claimant's lawyers. Furthermore, the Order gave powers to the Claimant's Lawyers, not the sheriff, to sell by private treaty. I find that the Order to sell by private treaty was grossly irregular, considering that this was an ex-parte application that was taking the sell process out of the hands of the sheriff who is legally mandated to undertake the seizure and sell.
46. I agree with the Defendant that the Order to sell by private treaty was irregularly granted because no special reasons were given why the Claimants sought such preferential treatment. Sale by private treaty is an exception and not the norm. Hence, it is not an alternative unless there is consent from all parties involved or there are exceptional circumstances warranting such a closed sale.
47. The Claimant pleads with this Court that the Order to sell by Private treaty was not used. However, I am still compelled by the facts and circumstances surrounding the procurement of that Order, to make a finding on the same. It is therefore my finding that the Order for Private treaty was grossly irregular and therefore invalid.
48. As for the legality of the sale and disposal of the property that was seized by the Sheriff on behalf of the Claimant. I have applied my mind to the manner in which the property was sold. The Claimant through his lawyer Mr George Jivason Kadzipatike has advanced several arguments to validate the sale. His main argument is that the property was sold by the Sheriff through Public Auction. He has therefore relied on sections 12, 15, 22, 16(1) and 20 of the Sheriffs Act. The above-cited sections, in his view, insulated the Claimant and the Sheriff, providing legitimacy to the actions of the two, in the disposal of the Defendants property.

The claimant asserts that the Sheriff has a right to hold on to the property for 14 days only, meaning any period beyond 14 days, the sheriff has the right to dispose of the property which has been seized. It is the Claimant's position that the Defendant ought to have satisfied the judgment debt within 10 days, or else the Sheriff can sale the property, see section **8 Sheriffs Act**.

49. Mr George Kadzipatike exhibited in his sworn statement, exhibit '**GJK1**'. Which is a sworn statement by Mr Victor Nyirenda , the Assistant Sheriff of Malawi in Mzuzu. The Defendant filed a Notice to Cross-examine Mr Nyirenda and Ms Jean Kaunda as well. However, the Claimant failed to secure the attendance of the deponents for cross-examination. Therefore, this Court ordered that the contents of the sworn statements could not be used in the current application. On the other hand, Mr Kadzipatike, filed a Notice to Cross-examine the defendants deponent Ms Bella Liu, and they obliged, by attending to Court for purposes of cross-examination.

50. If indeed this Court is to believe the claimant that the Sale by private treaty was waived by the Claimant, this court is interested in further knowing how the Claimant received the proceeds of sale, and how much was released from the sale? Who paid the proceeds of the sale to the Claimant?

51. No evidence has been proffered to that effect. It is not enough to plead that the Claimant is the wrong party to sue. After all, the Claimant could have applied for the Sheriff to be added as a party to substitute him by taking recourse to **Order 6 rule 8**, which provides for a removal as a party and he did not make use of this alternative:

8. The Court may, on an application by a party, order that a party in a proceeding is no longer a party where

(a) the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding; or

(b) there is no good and sufficient reason for the person to continue being a party

52. I have all reason to believe that, the role of the sheriff in the actual sale of the seized property in this case has been exaggerated by the Claimant, with the hope that several provisions of the Sheriffs Act will be thrown in the arguments, to cover up the illegalities that have been uncovered. It is clear that the Sheriff's officer, Mr Nyirenda was used by the Claimant, to obtain legal possession of the Defendants assets. As for the conduct of Mr Nyirenda, this Court will not judge on that because he is not the subject matter of this application.

53. It is my finding that the role of the Claimant in this case, usurped the powers of the Sheriff and the Claimants involvement in the sale of the property was illegal. It was not supported by the law, and the provisions of the Sheriffs Act cited, do

- not apply in the case, because there is sufficient evidence to prove that the Sheriff did not sell the seized assets, but the Claimant's lawyer, was involved in the sale.
54. I, therefore, move on to discuss the issue of good faith. Whether a sale is by public auction or private treaty, should there be good faith. It is required for the parties to demonstrate good faith in business dealings especially of this nature. **See *Unwin v Bond [2020]EWHC 1768*** . Good faith, among other things, requires obtaining a fair value for the goods that are being sold. In the absence of good faith, the sale is illegal and hence there is no legal basis to protect any bona fide purchaser.
55. Looking at all issues presented in this case, it is clear that the sale of the seized assets was done fraudulently and through misrepresentation of the role of the sheriff's Office in the transaction. It is a misapplication of the provisions of the Sheriffs Act to conduct oneself in the manner that Mr Kadzipatike and Mr Nyirenda undertook to execute the warrant of execution in this case.

DECISION

56. Based on the reasoning above, my ruling is that the sale of the seized vehicles belonging to the Defendant is hereby set aside.
57. It is also my finding that Mr Kadzipatike did not conduct himself properly in this case. It is clear that there was collusion between Mr Kadzipatike and Mr Nyirenda of the Sheriff's office in the seizure and sale of the defendant's assets. The conduct of the two officers is of a criminal nature and should not be condoned as these two are officers of the Court. The abuse of Court processes to pursue selfish and criminal ends is gross, uncouth, and undermines the power of the Courts to settle disputes justly. It makes a mockery of the whole justice system and calls to question the integrity of the lawyers, courts, and the legal profession at large.
58. To add on to the level of abuse of Court process, the Claimants lawyer Mr Kadzipatike, buried the case record with multiple cross-applications, to give a semblance of his level of engagement in the matter. Mr Sitima as well has filed his share of applications. I must admit that this case file has taken up a lot of the Courts time over a period of more than one year. Yet the actual substantive matter is related to the conduct of the parties in relation to the execution of an Order for damages and costs. This court is compelled to make further orders on the conduct of Mr Kadzipatike and Mr Nyirenda in the subsequent paragraphs.

ORDER

59. The sale of the seized assets is hereby set aside.
60. However, since more than one year has passed, and in the Claimant's own admission, the vehicle's ownership has passed on to other parties, since these are motor vehicles, the state of the assets is unknown. This Court Orders **the Claimant and his lawyer** to pay the total value of the seized vehicles, which is

MK192,603,397.62, within 30 days of this Order. This Court Has Ordered the payment of the sum to be jointly honoured by the Claimants lawyer Mr Kadzipatike, because there is evidence that he prevailed over the whole sale transaction. It is he and the Claimant who have benefitted from the illegality.

61. This Court Further Orders the Defendant to pay the claimant the Judgement debt of **MK48,541,831.27**, as per the Court order of 13th January 2022. This is because, this ruling does not affect the validity of the Order, unless, it is overturned by a superior Court.
62. This Court Further Orders that relevant authorities including the Police and Anti-Corruption Bureau to urgently investigate the conduct of Mr Kadzipatike and Mr Nyirenda (Assistant Sheriff) in the handling of the warrant of execution of this case.
63. This Court Further Orders the Malawi Law Society to take disciplinary measures against their member Mr Kadzipatike, on his conduct, which also borders on perjury, and dishonesty, in the execution processes related to this case.
64. The Claimant is condemned in costs of this application, and such costs, if not agreed, shall be assessed by the Assistant Registrar.
65. It is so ordered.

Made in Chambers this 16th May 2023



Charlotte Wezi Mesikano Malonda
JUDGE