IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 6 OF 1979

(IN BANKRUPTCY)

SUBASHI C. BOURI

versus

KADERVILLE V. MUDALIAR

Coram: Jere, Ag. Chief Justice

For the Applicant: Osman of Counsel
For the Respondent: Msisha of Counsel
Official Interpreter: Kadyakale

R U L I N G

This is a summons to set aside a Notice of Bankruptcy by the judgment debtor, Kaderville V. Mudaliar. The judgment creditor is Subashi C. Bouri. Mr. Osman appeared for the judgment debtor and Mr. Msisha for the judgment creditor.

The grounds upon which the summons is based are contained in an affidavit sworn by the judgment debtor. Mr. Msisha opposes this application. Mr. Osman bases his application on two points. The first point is that the judgment from which the bankruptcy notice stems is irregular. He submits that the Statement of Claim was issued on the 25th July 1979, and judgment was obtained in default of appearance on the 9th August, 1979.

It is conceded by Mr. Msisha that, as from the 1st August 1979, to the 1st October 1979, the courts went into Long Vacation. Mr. Osman argues that since the Long Vacation intervened, the time in which to enter an appearance ceased running as from the 1st August 1979, and therefore the obtaining of judgment on the 9th August 1979 was irregular. He also argues that the judgment obtained states that the interest on the amount claimed of K30,534, would be settled by the Court, and if that be the case the judgment itself was not final; and there was a further step to be taken by the judgment creditor to perfect the judgment before he could issue a Notice of Bankruptcy. He supports this argument by stating that the judgment creditor has issued a Notice to tax the bills of costs, whereas the Writ itself does not contain anything about the costs, so the argument goes; the judgment creditor has not obtained a final judgment warranting him to issue the Bankruptcy Notice.

It is argued by Mr. Msisha that the Notice of Appearance filed by the judgment debtor on the 14th August 1979, clearly indicates that the judgment debtor knew that time was running out, despite the fact that the Long Vacation had commenced. He further argues that a Notice of Appearance is not a pleading and should therefore be disregarded for the purpose of computing time within the Vacation. He cites Order 12, Rule 1, subrule (2), and again, subrule (4). He further states that, in practice, a Notice of Appearance is not regarded as a pleading because when a bundle of pleadings is submitted

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the Notice of Appearance is not included. In his view, a Notice of Appearance is a preliminary matter which is envisaged in Order 12, Rule 1, subrule (2), and also under Order 18.

The earlier objection by Mr. Msisha was that the judgment debtor had not challenged the Notice of Bankruptcy. Mr. Osman's submissions before this Court are directed against the judgment. Nothing is said against the Notice of Bankruptcy. However, Mr. Msisha went into the matter of how the judgment was obtained and, as I have said earlier, it is his considered view that the judgment was regular. Also, as stated earlier, a writ endorsed with a Statement of Claim was issued on the 21st July 1979, and was served on the judgment debtor on the 25th July 1979. Judgment in default of appearance was entered on the 9th August 1979 and on the 14th August 1979 a Notice of Appearance was sent to the High Court and was returned as being too late. The Bankruptcy Notice was filed in this Court on the 31st December 1979.

I will deal first with the preliminary objection raised by Mr. Msisha. I do not think there is much substance in that objection. The Notice itself is clearly headed "Summons to Set Aside Notice of Bankruptcy". It is true that under the Bankruptcy Act, section 4(b) it is clearly stated that once a Bankruptcy Notice has been served it shall not be invalidated by reason only that the sum specified in the Notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the Notice on the ground of such misstatement. But if the debtor does not give such notice he shall be deemed to have complied with the Bankruptcy Notice if, within the time allowed, he takes such steps as would have constituted a compliance with the Notice had the actual amount due been correctly specified therein.

It is clear, in my view, that this subsection refers to the amount of monies claimed. It does not refer to a judgment that has been irregularly obtained. If a judgment is irregularly obtained it is null and void and therefore a Bankruptcy Notice based on it is equally tainted by the same irregularity. It is, in other words, a house built on sand that can fall the minute one leans on it. It is further stated in the Notice of Bankruptcy the procedure that has to be adopted by the judgment debtor if he wishes to challenge the Notice. According to this Notice it is only when he has a counterclaim, a set-off, or a cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained. Obviously, in this case the judgment debtor is not covered by this stipulation.

In my view, the fact that the summons clearly states that the judgment debtor intends to apply to set aside the Notice of Bankruptcy is sufficient, and the Court will examine as to how judgment was obtained, if invited so to do, which is the position in the present case.

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Order 18 defines pleadings as follows:-

> "A generally indorsed writ of summons is not a pleading (Murray v. Stephenson (1887) 19 Q.B.D. 60); Wallis v. Jackson (1883) 23 Ch.D. (204); but a statement of claim indorsed on the writ is (Anlaby v. Praetorius (1888) 20 Q.B.D. 764); Robertson v. Howard (1878) 3 C.P.D. 280) and so are particulars for some purposes. But an originating summons it not a pleading, nor is an affidavit in support thereof (Lewis v. Packer (1960) 1 W.L.R. 452), nor is a preliminary act in an Admiralty action. For pleadings generally see Bullen & Leake & Jacob, 'Precedents of Pleadings' (12th ed.) and 13 Court Forms 147."

It is clear that a generally endorsed writ of summons is not a pleading. However, a statement of claim endorsed on the writ is a pleading.

This Order categorically excludes in the definition of pleadings such documents as originating summons or affidavit in support thereof, or preliminary act in an Admiralty action.

Order 1, rule 4, states that "pleading" does not include a petition, summons, or preliminary act. It is the submission of Mr. Msisha that a Notice of Appearance is a preliminary act and therefore not a pleading. No authority has been cited to me in support of his argument that a Notice of Appearance is not a pleading. What is clear, however, is that a statement of claim endorsed on the writ is a pleading. If it is a pleading it therefore starts the process of exchanging documents, and it is this process of exchanging documents that constitutes the process of pleadings up to what is called the close of pleadings. One would have thought that any document within this process is a pleading. If it is not a pleading it means that it would be necessary to exclude some documents. This clearly would entail a discretion by the Court as to which documents should be excluded. I doubt if this is the petition.

The process seems to be that a writ endorsed with a Statement of Claim is issued, and by the very fact of that writ an appearance must be entered and then a defence.

It has never been suggested that a defence is not a pleading. Why then should we draw a line and, if so, where when it comes to the Notice of Appearance? On the other hand, if it is a generally endorsed writ the matter is very different. In my view, if a writ endorsed with a statement of claim is issued, a Notice of Appearance is equally a pleading. It is not a preliminary act. A preliminary act, in my view, seems to refer to Admiralty acts, or where the writ is generally endorsed. In these circumstances the Long Vacation which commenced on the 1st August 1979, effectively prevented the judgment creditor from entering judgment in default of appearance. The judgment was therefore irregular.

Since I have held that the judgment was irregular it follows that under Order 13, rule 9, it can be set aside ex debito justitiae. On the other hand, if I am wrong in my decision that a Notice of Appearance in the present circumstances is a pleading I would have allowed the judgment to be set aside under the discretionary powers of the Court, see Order 13, rule 9, subrule (10), on the grounds that the judgment had not been perfected. The defendant should file his defence within twenty-one days effective from today's date, i.e. 7th February 1980.

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In these circumstances the notice of bankruptcy filed in this Court on the 31st December 1979, is set aside, together with the judgment, effective as from 7th February 1980.

Further proceedings having been instituted on the above judgment to be stayed. Costs for the judgment debtor. Leave to appeal granted.

Made in Chambers this 7th day of February, 1980, at Blantyre.

N. A. JERE
AG. CHIEF JUSTICE