

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.597 OF 1986

BETWEEN:

JAMES ALLAN SAUZE.....APPLICANT

- and -

ROSEMARY ARGENTE.....RESPONDENT

Coram: MBALAME, J.

Chatsika of Counsel for the Applicant
Msaka of Counsel for the Respondent
Namvenya, Court Clerk

R U L I N G

There are two applications before me and they are both made by the plaintiff in this case. In the first application the plaintiff is seeking an order that the defendant be restrained from taking out of Malawi, and therefore out of the jurisdiction of this Court, any property collected from the house on Plot No. 187 at Mapanga. The other application is for a stay of execution of my judgment of 11th March, 1988 which was in favour of the defendant.

I will deal with the application for an injunction first. It is opposed by the defendant. Mr. Chatsika who appears for the plaintiff has filed an affidavit and paragraphs two to four thereof are in the following terms:-

- "2. THAT the Respondent lives in the United Kingdom and intends to take with her a lot of the property which is the subject matter of this case and that if the same is taken out of the Court jurisdiction it will not alone pre-empty the Court's power in respect of the property but will make it difficult to come back.
3. THAT most of the property is at Glens Removals and is ready for shipment to the United Kingdom.
4. THAT some of the property which is ready for shipment is directly connected with other property which was seized by the Police from the Respondent's father's house and that in determining the case in respect of the property with the Police it will be necessary to have the other property within the jurisdiction."

The defendant has also filed an affidavit in opposition and is as follows:

1. That I have leased Plot BL 187 to a tenant who has his own furniture.
2. Consequently, I had to remove my furniture in that house for safe custody elsewhere.
3. That I stored all my property from the said Plot with Glens Removals with instructions that they should keep the same for me until I return from my studies in England.
4. That the property that I have stored with Glens is property that I will need on return from England and there is no reason why I should take the same to England.
5. Further, such property did not form part of the present proceedings and hence this application for injunction taking under these proceedings is misconceived.
6. Even if the same formed part of the proceedings which is however denied the matter is no longer sub-judice as there is a subject matter of the Honourable Court on the issue.
7. None of the property that has been stored with Glens Removals is a subject matter of any criminal proceedings and no criminal proceedings have been commenced against me.
8. I know of no property that was taken from my house at Plot BL 187 which is presently being held by the Police.

It is therefore my humble prayer that the application for injunction be dismissed with costs.

There is yet a third one sworn by the Operations Manager of Glens (Malawi) Limited and is as follows:

1. I am authorised by the Company to swear this Affidavit.
2. That I personally know Mrs. Argente.
3. That on 24th February, 1998 my Company collected goods from her house at Mapanga to our premises.
4. That her instructions in respect of those goods was that we should keep them in storage at our premises for an initial period of 1 year.
5. That our Company has not been instructed by Mrs. Argente or any person on her behalf to expatriate the goods to the United Kingdom or any other destination.

Mr. Msaka who appears for the defendant has brought up a preliminary point. It is submitted that under O.59/13/1 this Court is not competent to hear the application. That order states that "where an action has been dismissed in the Court below, quere whether that Court has jurisdiction, e.g. to restrain a defendant from parting with a trust fund pending an appeal; the application for that injunction must be made to the Court of Appeal".

I would agree with the submission and I consequently dismiss this application with costs.

The second is in respect of the stay of execution. Again, counsel for the plaintiff has filed an affidavit in support of the application and paragraphs 2 to 5 are as follows:

2. THAT the plaintiff was the owner of the Plot and the house situated at Plot BL 187 and also the owner of all the property which was in that house and that the only question which the Court has to decide is whether the Applicant gave such property to the Respondent or whether by some operation of law the Respondent has acquired any title to the property.
3. THAT the Applicant has appealed against the decision of the trial Court and that execution of the judgment in a case of this nature will have the effect of pre-empting the decision of the Appeal Court.
4. THAT part of the judgment is in the manner of specific performance and as the Respondent intends to leave the Country and settle in the United Kingdom it is only right and proper that the subject matter of the judgment remains within the jurisdiction.
4. THAT it is just and equitable that the property remains in Malawi until the matters referred to in Paragraph 2 of this Affidavit are resolved.

The defendant has also filed an affidavit in opposition and is as follows:

1. I have read Mr. Chatsika's affidavit in support of application for stay of execution.
2. I am unaware of the matters pleaded in paragraph 2 of the said affidavit since the same did not arise in the present proceedings.
3. I know no reason why executing the judgment will affect the appeal.
4. There is no question of specific performance in the present proceedings.

5. It is untrue that I intend to settle in the United Kingdom and I put Mr. Chatsika to strict proof thereof.
6. It is therefore my prayer that the application be dismissed on the above grounds.
7. The application should also be dismissed because it is incompetent.

Mr. Msaka has also raised a preliminary point. He submits that the application must fail because it does not comply with O.59/13/4. The application should have been made on notice by motion and not by summons as is the case here.

In my judgment, the application must fail on two grounds. Firstly, as has been submitted by Mr. Msaka the application does not comply with O.59/13/4. Secondly, as I observed in the case of The Administrator of the Estate of J.E. Mwela vs. Mandala Motors Ltd., M.S.C.A. No.12 of 1986, it is now settled law, as was said in the Annot Lyle (1886) II PO 114 and also in the case of Monk vs. Bartram (1891) 1 Q.B. 346, that the court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled". No sufficient reason has been given to show that the defendant will not be in a position to refund to the plaintiff the sum of K7,500 if the plaintiff succeeds in his appeal. I see no merit in the application and I dismiss it with costs.

Made in Chambers this 5th day of April, 1988 at Blantyre.



R.P. Mbalame
JUDGE