Banda J

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 105 OF 1988

RABSON K.J. ZGAMBO ..... PLAINTIFF

VERSUS

KASUNGU FLUE CURED TOBACCO ..... DEFENDANT

Coram : Kalaile J.
Makhambera, For the Applicant
Mhango, For the Respondent

R U L I N G

On 14th February 1989, I gave judgment in default of appearance in favour of the plaintiff in the amount of K7,004.17 with a caveat that the District Registrar should compute interest thereon persuant to the provisions of s.11 (v) of the Court Act.

On 16th February 1989, Mr Jussab of Sacranie Gow and Company argued a motion to set aside judgment in default of appearance at trial persuant to Order 35 rule 2 of the Rules of the Supreme Court. The judgment in question is the one which I delivered on 14th February 1989. I refused to set aside that judgment on the grounds that no affidavits were sworn and filed to support that particular application. Nor did the application proffer any direct evidence in connection thereto.

On 15th March,1989 I heard yet another ex parte application. On this occasion Mr Msaka appeared in person and the hearing took place in the Principal Registry. I made the following Order which I reproduce in full -

"ORDER

This is an ex-parte summons to stay execution of my judgment which was delivered on 14th February, 1989 at Lilongwe. The material part of Mr Msaka's affidavit in support of the summons states that :

"2. Judgment was on 14th February,1989, entered against the Defendant company as a result of its failure to attend on the date set for hearing of the matter whereupon the plaintiff proceeded to prove its case.

"2.

"3. That my office made an application by notice of motion to set aside the judgment but unfortunately my office omitted to support the application with an Affidavit. The said application was on that ground dismissed.

4. That I have filed with the court a fresh application by notice of motion properly supported by Affidavit.

5. In that application it is the Defendant's prayer that the judgment obtained in its absence be set aside on the ground that there was good reason why it failed to attend the hearing and also on the ground that it has a good defence to the Plaintiff's claim.

6. I verily believe that in the interests of justice the honourable court will set aside the judgment to enable the Defendant be properly heard.

7. That I verily believe that it is the intention of the Plaintiff to enforce the judgment by execution.

8. That if the Plaintiff so executed the judgment, and if the judgment is then set aside such setting aside would be rendered nugatory and execution in the meantime would cause irreparable damage to the Defendant."

To my mind, this application stands of falls on what is deposed mainly in paragraph 8 of Mr Msaka's affidavit. The key words here are "causing irreparable damage to the Defendant". In his submissions before, me Mr Msaka did not even address me on paragraph 8, so that I am not aware of any irreparable damage which the Defendant company would suffer as a result of the execution of the judgment. In Civil Cause No. 556 of 1987 being S.E. Nthenga v. Blantyre City Council, Mtegha, J. observed quite correctly, in my view that :

> "An ex-parte application in these circumstances could be made provided the matter is of an urgent matter and failure to do so would cause irreparable damage."

In his submissions and in his affidavit, there is nothing which Mr Msaka argued or stated which disclosed that the matter was urgent or that irreparable damage would result. To succeed in the application, counsel should have substantiated what was deposed by facts. This was not done as I shall endeavour to demonstrate presently.

Counsel also submitted that judgment was obtained in the absence of defence and thereafter, an application to set aside the judgment was made but no affidavit in support was filed. For that reason the application was dismissed although there were sufficient grounds why the applicant was absent at the original trial.

It was further submitted that the plaintiff (Zgambo) intended to execute the judgment by warrant of execution and a stay was being sought on the strength of the following authorities :

(a) Nthenga v. Blantyre City Council (Civil Cause No 556 of 1987). I have already considered this authority in the course of this Order earlier on.

In that case there was an application by the plaintiff to have vacated and declared null and void an order made of Mtegha, J. because the original application before the judge upon which it was based contradicted 0.47 rule 1 of the Rules of the Supreme Court. That latter application was dismissed and as can be noted, that case was authority on an entirely different issue, although the passage cited herein properly stated the considerations which should be borne in mind in any ex-parte applications. For reasons which I have stated earlier on in this Order, this case does not assist the applicant because it has not been demonstrated that any irreparable damage will ensue against the applicant.

(b) Kotecha Enterprise v. Palma Building Contractors (Civil Cause No 458 of 1983).

In this case, Skinner, C.J., stated that :

> "As a general rule the only ground for a stay of execution in these circumstances is if the damage or debt were paid, there would be no probability of getting them back. There is no such averment in the instant affidavit."

He later on went on to say, in the same Order that :

> "I am dealing with the matter by way of ex-parte proceedings because it is urgent but I would only have granted a stay of execution for two or three days in order to have an inter-parte application heard, but I see no reason to do that as the great bulk of the money is owing in any event."

Now, I do not see how this case assists the applicant either since it was not averred that there would be no probability of getting back the money if the inter-parte application was heard and resulted in the applicant's favour.

(c) Lastly Counsel cited Maunde v. National Bank of Malawi, (Civil Cause No 330 of 1982).

I have read the judgment and do not see what bearing it has with the issues arising in this application.

This application cannot, therefore, succeed for reasons which I have given herein."

On the 6th of November 1989, almost eight months later, I have the present application before me. It is an application by the defendant's legal practitioners that execution if not carried out yet, be stayed and/or if already carried out, then the money be paid into court pending the determination of the appeal herein. It was contended by Mr Makhambera that what has been executed should remain in the hands of the sheriff untill the determination of the appeal against my 14th February 1989 judgment. Mr Makhambera produced an affidavit sworn by Mr Mgogo of National Bank in which was deposed the fact that Zgambo, the plaintiff in the February judgment owed National Bank the sum of K114,240.00. He further argued that the court record in respect of the pending appeal to the Malawi Supreme Court was ready and hoped that the matter would be heard in the said Court within the near future. It would seem, however, that the matter has not been listed in the cause list for the forthcoming Supreme Court sittings.

Lastly, Mr Makhambera argued the point that the respondent's affidavit in opposition is based on a farming enterprise which is dependent on many unreliable factors such as rain fluctuating prices and the like, so that the estimated earnings of K50,000 are really spurious.

Mr Mhango, in turn, argued that this application is an abuse of process of the court. The applicant, by an ex parte notice, applied for a stay of execution as far back as March this year. An order was made on 28th March refusing a stay. So that the applicant cannot now make a second application

seeking exactly the same relief. Mr Mhango cited the case of **Stephensonv.** Garnett 1898 1Q.B. p. 677 in support of his argument. What happened in that case is that in an action in a county court, judgment was recovered for a spcified sum and costs. But before the costs were taxed the plaintiff agreed, on a representation of the poverty of the defendant, to accept a smaller sum than that for which judgment had been given, and executed a deed releasing the defendant from the judgment debt and costs.

Subsequently, the plaintiff presented in his bill of costs, and applied to the county court judge for an order to tax, upon the ground that the release had been obtained by misrepresentation. The county court judge, after hearing evidence, found that the execution of the deed had been obtained by misrepresentation, and made an order that the costs should be taxed, and should be paid together with the balance remaining due under the judgment. The defendant brought an action in the High Court for a declaration that he had been released from the judgment debt and costs, and for an injunction to restrain further proceedings to enforce. payment.

It was held by the Court of Appeal that as the question raised in the action was identical with that decided by the county court judge upon the interlocutory application, and had been decided by a court of competent jurisdiction, the action ought to be stayed as frivolous and vexatious and an abuse of the process of the court.

The Garnett decision was later applied with approval in Hunter v. Chief Constable of the West Midlands Police (1981)3 W.L.R. 906 H.L. (E); (1981)3 ALL E.R. 727 at page 733. Lord Diplock states at p. 734 that -

> "The passage from Lord Halsbury LC's speech in Reichel v. Magrath 14 App Cas 665 at 668 deserves repetition here in full :
>
> '.....I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'"

That House of Lords decision really settles the matter and I hold that the Hunter and Garnett cases are on all fours with the matters under consideration in these proceedings. With respect, Mr Mhango's submission is the correct one for purposes of this case on the point of abuse of process.

6/.....

Mr Mhango pointed out that the applicant should have filed an appeal before the Malawi Supreme Court under 0.59/3/4 (see page 895 of 1988 Ed. of the Rules of the Supreme Court. With respect, I do not agree with that submission on the basis of the decision in the Garnett case.

The second objection raised by Mr Mhango to this application is that execution has already taken place. The sheriff's report indicates that judgment has been enforced. The sheriff is presently holding the judgment debt without the backing of any court order. The proper course for the applicant to take is to apply to set aside execution and not to apply for a stay.

As to the argument that the money should be paid into court, Mr Makhambera failed to cite any authority to support a payment into court after execution was already levied especially if the execution is after the expiry of eight months from the date the judgment in default was delivered. He later cited the cases of Grant v. Bank Franco Egyptien 1878 CPD, and Hood Barrs v. Crossman & Another 1897 AC 172.

I am unable to find the exact law report for the Grant case. But I have been able to have access to the law report for the Hood Barrs case. This is what is stated therein from the editors head note :

> "A solicitor who has demanded and received payment of costs payable to his client under an order of court, with knowledge that an appeal against that order was pending, cannot on its reversal be ordered personnally to repay the costs so paid to him where there has been no misconduct and no undertaking to repay."

The case cited by counsel does not have even the remotest relevance to the issues in the proceedings under consideration since we are not involved in matters concerned with the misconduct of solicitors.

Mr Mhango's final argument was with regard to the alleged debt of K114,240.00 with National Bank. He put cold water on this debt argument by producing a ruling by the Deputy Registrar dated 24th June 1988. It is a relatively brieft ruling and I reproduce it in full. This is what it states -

7/.....

"RULING

This application to set aside judgment taken out under O 13/9 R.S.C. was originally set for 14th June, 1988.

The parties were duly served. It subsequently came to be that I had to be in Lilongwe on that day. As a result both through the phone and by letter on 9th June, 1988 the parties were notified of the change of date of hearing to 22nd June, 1988. Only Mr Mhango of Bazuka and Company appeared on the new date and, satisfied as I was that both parties had been duly advised of the change of date, I proceeded to hear him.

Upon going through the file I note that the judgment which is sought to be set aside was regularly entered on 12th February, 1988 after service of Writ had been duly acknowledged without service of defence following within the time prescribed. It is settled law now that a court can only set aside such type of judgment once there is a defence on the merits or at least some other very sufficient reason for doing so. A defence on the merits is one which raises arguable or triable issues (13/9/5 R.S.C.).

Now after hearing Mr Mhango and going through his affidavit in support of the application, to which affidavit is exhibited the defendant's proposed defence marked 'D' I am satisfied that the defendant has raised issues that deserve to go to Court. By this exhibit to his affidavit the defendant proposes to deny liability in total both for the liquidated claim and the interest and he also seeks to aver that his liability, if any, was absolutely assigned to a limited liability Company Prior to the start of this suit. Having come to the conclusion I have done, that the affidavit supporting the application raises triable issues I set aside the judgment in default dated 12th February, 1988 and grant the defendant seven days, as requested, within which to file his defence. Costs to the Plaintiff in any event."

8/.....

At the end of the day Mr Makhambera has failed to establish that the respondent is a man of straw.

Mr Mhango's affidavit in opposition has attached to it exhibit "R15J 2" which indicates that Mr Zgambo hopes to raise a profit of about K50,000.00 from sales of his current tobacco crop. The computation of this figure is not guesswork since from the 1975-76 tobacco crop he realised a profit of K15.000 when he used a capital sum of a mere K9,000. If Mr Zgambo applies the sum held by the sheriff to his farming enterprise he is certain to come up with a net profit around K50,000.00. In conclusion the applicant failed to establish any special circumstances to demonstrate that the respondent is a man of straw. As Skinner stated in Kotecha Enterprise v. Palma Buidling Contractors (Civil Cause No 458 of 1983), -

> "As a general rule the only ground for stay of execution in these circumstances is if the damage or debt were paid, there would be no probability of getting them back."

Mr Makhambera, like Mr Msaka before him, has failed to establish that there would be no probability of getting the money back. This application, therefore, fails on two grounds. First, on the ground that -

> '..... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frirolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court. Per A.L. Smith L.J. in Stephenson v. Garnett (1898)1 Q.B. 677 at 680-681.

The second ground is the one stated by Skinner C.J. in the Kotecha case where he opined that it should be proved that if the debt is paid there would be no probability of recovering that sum from the respondent. So, the sheriff is hereby ordered to pay Mr Zgambo or his counsel the judgment debt and interest thereon forthwith. Costs to the respondent.

Made in Chambers this 14th day of November,1989 at Blantyre.

J.B. Kalaile

J U D G E