

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 2128 OF 2000**

**BETWEEN:**

NYIRENDA MSISHA ..... PLAINTIFF

VERSUS

CITY OF BLANTYRE ..... DEFENDANT

**CORAM:** Mrs Kamanga, Deputy Registrar  
Nyirenda, for the Plaintiff

**RULING**

This is the plaintiff's application to vacate order of stay of execution that was granted by the court on 23rd April 2001. The basis for the application is that the plaintiff alleges that the court should not have so granted the stay as firstly the order was obtained without substantiating any meritable ground or without disclosing why such meritable ground could not be advanced. The defendant's affidavit in support of application to stay execution reads para "4 ..... The defendant would like to apply to court to set aside the judgement on the ground that he has a defence on merits to the plaintiff's claim". "Para 5 .... the defence grounds for such application will appear in the affidavit in support thereof."

The affidavit in support does not in any way elaborate on the meritable defence and the court stayed the execution.

The second reason for the plaintiffs application to vacate the stay of execution avers that the history of this matter indicates that the defendant through its counsel has

deliberately flouted court orders in order to defeat the course of justice. Plaintiffs counsel invited court to look at the history of this matter. The history of this matter indicates that the plaintiff issued a writ of summons. The defendant filed a defence that was served on the defendants counsel on 9th February 2001. The plaintiff applied for summary judgement, and a date of hearing was set down. On the date of hearing, the defendant as well as its counsel were not available at beginning of the proceedings, the court granted the plaintiff leave to proceed with the hearing. After the plaintiff's counsel had made it's submission, defence counsel appeared, and sought an adjournment. The court adjourned the matter to 12th April 2001 at 8:00 am with instructions to defence counsel to file and serve an affidavit in opposition by 6th of April 2001.

The matter was called on 12th of April 2001 and defence counsel was absent. Defence counsel had neither filed an affidavit in opposition, nor served it on the other party. Defence counsel never gave any reasons for absence. The court thereby granted summary judgement for the plaintiff. On the 23rd day April 2001 the defendant moved the court to stay execution under Order 47/1 of the Rules of Supreme Court. The grounds for the application are as has already been discussed above. And the court granted the stay of execution.

Looking at the history of this matter, I totally believe that when making the application to stay the execution, the defendants counsel should have given the Registrar a history of the process before making his prayer for stay. The defendant's counsel I was obliged to do this as an officer of the court bearing in mind that the registrar who was now sitting, for this application was a different individual from the registrar who had mandated the defence to file an affidavit in opposition within a specified period and also attend court on a specified date. Both orders were never complied with by the defence and no explanation was given for non - compliance.

The affidavit in support of the application to stay execution is so skeletal that this court wonders whether the same was not deliberate on the part of defence to defeat the course of justice. Order 47/1/1 of the Rules of Supreme Court provides that where a judgement is given and the other party is liable to execution the court may stay such execution.

However, in consideration whether to grant a stay of execution on a money judgement, the court in exercise of its discretion must start with the consumption that

there has to be a good reason to deny the plaintiff the fruits of his judgement. In making this assumption in favour of the defence, the court must be assisted as much as possible by the defence counsel in his capacity as officer of the court by adducing before such court whatever transactions had preceded that particular application. This is especially so if one considers that such an application is an ex-parte application and the opposition party does not have a right of guidance at the time of hearing the ex-parte application. Furthermore, the affidavit in support itself as noted, is silent on what the merits of the defence. With the history of this matter, this is an application where the defence should have disclosed its meritable defence at the application for stay itself, much as it is appreciated that the same would have also been made on the application to set aside judgement.

It is on the basis of the findings that I have made that I find that the stay execution that was herein ordered on 23rd April 2001 should be vacated.

**Made** in Chambers this 27th day of April 2001.



Mrs I Kamanga

**DEPUTY REGISTRAR OF HIGH COURT**

there has to be a good reason to deny the plaintiff the fruits of his judgement. In making this assumption in favour of the defence, the court must be assisted as much as possible by the defence counsel in his capacity as officer of the court by adducing before such court whatever transactions had preceded that particular application. This is especially so if one considers that such an application is an ex-parte application and the opposition party does not have a right of guidance at the time of hearing the ex-parte application. Furthermore, the affidavit in support itself as noted, is silent on what the merits of the defence. With the history of this matter, this is an application where the defence should have disclosed its meritable defence at the application for stay itself, much as it is appreciated that the same would have also been made on the application to set aside judgement.

It is on the basis of the findings that I have made that I find that the stay execution that was herein ordered on 23rd April 2001 should be vacated.

**Made** in Chambers this 27th day of April 2001.



Mrs I Kamanga

**DEPUTY REGISTRAR OF HIGH COURT**