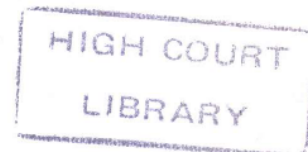


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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 359 OF 2001



BETWEEN:

PALM STATIONERY MANUFACTURERS (PTY) LTD.....PLANTIFF

AND

CLASSIC HARDWAREDEFENDANT

CORAM: POTANI, REGISTRAR
Kasambara, Counsel for the Plaintiff
Kauka, Counsel for the Defendant

RULING

What I am being called upon to determine is whether or not the plaintiffs, Palm Stationery Manufacturers (PTY) Limited, should be ordered to pay security for costs. This follows an application for such order made by the defendants, Classic Hardware. The application by the defendants is made under Order 23 of Rules of the Supreme Court. The application is supported by the affidavit of counsel for the defendants, Alinane Kauka.

Order 23 rule 1 stipulates situations in which the court is empowered to order a plaintiff to pay security for costs. One such situation is where the plaintiff is ordinarily resident outside the jurisdiction of the court as is alleged in paragraph 4 of the affidavit in support with regard to the plaintiffs in this case. It should however be remembered that the power bestowed upon the court is discretionary and therefore has to be exercised judiciously. The court should therefore consider the circumstances of each case and it was held in Sir Lindsay Parkinson and Company Ltd vs. Tiplan Ltd (1973) QB 609 that the major consideration the court should consider is the likelihood of the plaintiff succeeding. The court, however, need not go into a detailed examination of the merits of the case.

Reverting to the present, there is no dispute that the plaintiff is a foreign entity. Again it seems the averment in paragraph 5 of the affidavit in support that the plaintiff has no assets in the court's jurisdiction is also not controverted. Prima facie, therefore, an order for security for costs can, in my view, be properly made in this case. However, there is more that needs to be considered in this case. The defendants took out the summons for security for costs on March 1, 2001 and the same was served on the plaintiffs lawyers on March 6. The summons was returnable on March 28 but before that date, the plaintiffs, on March 16, entered judgment in default of service of defence subsequent to which execution was levied on the defendants.

The issues that emerge and call for the court's determination are twofold. Firstly whether in view of the pending application for security for costs, the plaintiffs ought to have entered the default judgment. Secondly, as a rider to the first question, whether an order for security for costs can be made after judgment.

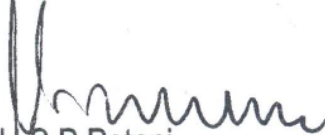
It has been the contention of the defendants that since the summons for security for costs had as part of a clause in the following wording: "and that in the meantime all further proceedings be stayed", the plaintiff ought not to have entered judgement. Counsel for the plaintiffs, however, was of the view that on a reading of the summons in its entirety, what emerges is that the defendant, by the summons, had intended to apply, at the hearing, for an order for security for costs and that upon the making of such order all further proceedings be stayed.

It is my considered view that a summons for security for costs, no matter how it is worded, in itself, would not operate as a stay of further proceedings. Usually it is only after the court has ordered payment of security for costs that it would order stay of proceedings until payment of the security. See Practice Note 23/1-3/19. That said, the plaintiffs were perfectly entitled to enter the default judgment notwithstanding that there was a pending summons for security for costs. Perhaps, I should also state that the prudent thing the defendants should have done would have been to also serve a defence. Indeed, it was held in Re Smith (1896) 75 LT 46 CA that the right to security is not waived by service of defence. The judgement the plaintiff entered can therefore not be faulted. In my view, it was regularly entered as such the defendant is liable to sheriff fees and expenses consequent upon the execution of the judgement.

I now move on to consider whether an order for security for costs can be made after judgment. It is submitted under Practice Note 23/1-3/28 that an application for security may be made after judgement for the costs of further proceedings directed

by the judgment like where the judgment has ordered the taking of an account before an official Referee and **Brown vs. Haig** (1905) 2 ch 37 is a case in point. In the instant case, the judgment does not direct any further proceedings out of which costs would be incurred as such it is outside the ambit of **Brown v. Haig**. It is however important to note that the judgment herein being a default one, it can be set aside at anytime so long the defendants demonstrate that there is a defence on the merits to the plaintiffs claim. This the defendants have not yet done and as already observed the fact that the defendants took out a summons for security is no justification for failure to serve defence. Such being the case, the position, as it is, there is a great prospect of the plaintiff's case succeeding as the defendants seem to be failing in coming up with a defence since they failed to serve a defence when they should have done so. I consequently dismiss the application with costs to the plaintiff.

Made in Chambers this day of November 22, 2001, at **BLANTYRE**.


H S B Potani
REGISTRAR

HIGH COURT
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