

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 588 OF 2001**



BETWEEN:

A.K.I INVESTMENTS.....PLAINTIFF

AND

MALAWI HOUSING CORPORATION.....DEFENDANT

CORAM: TEMBO, ASSISTANT REGISTRAR

Kauka, Counsel for the Plaintiff

Nkuna, Counsel for the Defendant

ORDER

This is this court's order on the defendant's application to set aside execution of part of the judgment herein on the ground that the said execution was irregular.

By the consent of both parties herein a consent judgment had been entered for K12 million interest on sums due from the defendant to the plaintiff and for K500,000.00 collection costs. The consent judgment is dated 11th September, 2003 and the judgment sum was to be paid in 24 equal monthly instalments of K500,000.00 each beginning August, 2003. The defendant had defaulted in payment of the November instalment as at the date of hearing of the instant summons. As a result of that default the plaintiff issued a certificate of non-compliance of the defendant with the terms of the consent order and indicated that the plaintiff was therefore at liberty to execute against the defendant for the whole sum due on the consent judgment of K10million. A writ of fieri facias consequently issued for the whole sum of K10 million on 13th January, 2004. The defendant contends that the said execution was irregular in that the plaintiff was only entitled to executed for the sum in default of K500,000.00 and not for the whole sum of the judgment debt. The defendant was condemned to pay Sheriff fees on the whole sum of the judgment debt which come to K2,257,020.00 subject to reimbursement from plaintiff if the execution was irregular. And the defendant argues that since the execution was irregular then on its being set aside the plaintiff should bear the Sheriff Fees in

excess of the K500,000.00 with regard to which the plaintiff was entitled to levy execution.

The defendant argued that there was execution herein because the bailiff intimated to the defendant that the defendant's vehicles had been seized and because the bailiff also locked up the premises where the defendant had packed the vehicles with respect to which the bailiff had intimated the seizure

The plaintiff contends on the contrary that, firstly, there was no execution herein and so there is no execution to set aside and no liability for Sheriff Fees. Counsel for the plaintiff was of the view that what the officer of the Sheriff did herein did not constitute seizure of the defendant's goods to amount to an execution warranting payment of Sheriff fees. He cited Vol. 16 Halsbury's laws of England 3rd Edition at Par. 84 on P. 55 on definition of a valid seizure. He went on to explain that what the Sheriff officer did herein would not without the court's authority amount to a trespass to the defendant's vehicle so that it constitute a seizure. And that a trespass to the vehicles was necessary for there to be a seizure. Counsel for the Plaintiff cited Street on Torts on the definition of a seizure. He submitted that where there is indirect interference with the goods as has been the case herein there is no trespass and cited Covell v. Laming 1801 1 Camp 497. And further that to lock up the room where the plaintiff's goods are as was the case herein is not a trespass to such goods and cited Hartley v. Moxham [1842] 1 QB 701. This court has thought long and hard about this submission and that of the defendant countering this submission.

This court chooses to agree with the defence that there was a valid seizure herein. This court is of the view that par. 84 of Vol. 16 of the 3rd Edition of Halsburys Laws of England is very clear that an entry upon the premises on which the goods are situate together with an intimation of an intention to seize the goods will amount to a valid seizure see Watson v. Murray and Company [1955] 2. QB. 1

The most important aspect is that it is a question of fact whether a seizure has been effected in any case. See Bird v. Bass (1843) 6 Man & G. 143. This court has considered the facts obtaining in the present case namely; that the Sheriff's officer went to the defendant's premises under the authority of a writ of fieri facia's, informed the agents of the defendant that the defendant's vehicles in its parking lot were seized and would be removed if the defendant did not satisfy the execution sum by a fixed time of that day and then locked up the defendant's vehicles in the parking lot. It is clear, in the view of this court, that the Sheriff officer entered the defendant's premises and intimated an intention to seize vehicles of the

defendant. There is no doubt herein that a seizure had been made and the same had registered on the minds of the agents of the defendant. Having found that there was a valid seizure this court is of the view that there was an execution of the writ of fieri facia's to be considered herein as to whether it was regular or not in the circumstances. As stated earlier on the defendant asserted that the execution was an irregular one in that it was for the full judgment sum and yet the defendant had only defaulted on a single instalment.

The plaintiff has a contrary view on the defendant's assertion. The plaintiff's view is that the execution was regular. The plaintiff strongly contended that where, as is the case herein, there's an order for payment of debt by instalments then on default in payment of an instalment the whole sum due becomes payable. And that then the plaintiff is entitled to execute for the whole sum due as was the case in the present case. Counsel for the plaintiff cited Section 7 Sheriff's Act in support of that contention. As a sub argument the plaintiff also submitted that under principles of contract the breach of the contract to pay debt by instalments herein entitled the plaintiff to treat the said contract as repudiated and to accept the repudiation. And consequently entitling the plaintiff to levy execution for the full judgment. The plaintiff stated this on the ground that the consent order herein is no less a contract between the parties despite the fact that it later became a consent order made under the hand of the court.

This court finds it prudent to note that the consent order herein only provided for the payment of the debt by 24 equal monthly instalments. It did not provide for what would happen in the event of default in payment of any instalment.

As already stated earlier on the defendant asserted that the plaintiff was only entitled to execute for the K500,000.00 the sum in default and nothing else. And consequently that the plaintiff should bear sheriff fees for the execution in excess of the said K500,000.00. This court notes that the argument raised by either side is very persuasive. When one considers the sub argument raised by the plaintiff one may wonder indeed as to why the defendant can default and not suffer execution for the full sum. The result it appears, in that case, to be that the defendant benefits from the contract although it breaches the same. But that is just one side of the sub argument. One may turn around and note that as at the date of the default the plaintiff was only entitled to the single instalment which is in actual default. The defendant at that point has not breached the contract in relation to the rest of the instalments and effectively the plaintiff is not entitled as yet to the instalments that are not yet due.

This court is therefore of the view that the sub-argument is not very useful in resolving the issue at hand and that Section 7 Sheriff's Act is the major determining feature. The section in sub section 1 is clear that where a court has made an order for payment of a judgment by instalments no warrant of execution shall be issued until after default in payment of some instalment according to the order. This court views the subsection as one simply stating the position effectively that execution of judgment is automatically stayed by an order for payment of such judgment by instalments. Compare Section 61 Execution Act of 1844 in England. And the stay lapses if there is default in payment of some instalment. This sub section does not indicate whether on such default the plaintiff can execute only for the instalment in default or for the full judgment debt. The view of this court is that to discover for what part of the judgment the plaintiff can execute in cases of default on some instalment one has then to consider Section 7 (2) Sheriffs Act. Looking at Section 7 (2) Sheriffs Act this court feels that what determines the manner of execution on such defaults is the order of the court as made either at the time of the original order for payment of debt by instalments or as made at a subsequent time. This court has already pointed out that the original consent order makes no provision for execution in the event of default. The plaintiff submitted that in such a case execution ought to follow for full judgment debt in the event of default on payment of some instalment. Clearly this is not the correct position in view of Section 7 (2) Sheriff Act. In the present case there was no provision for execution on default in payment of some instalment either in the original order for payment by instalments or at a subsequent time. What should be the correct position in the circumstances.

This court is of the view that the defence is right that in the absence of any agreement on provision for execution on default then execution should only be for the sum in default. Why should this be so? When agreeing to payment of debt by instalments the creditor appreciates the debtors' financial difficulties. And the debtor undertakes within his financial constraints, to pay a certain sum within every fixed period. Now it would not, in this court's view, be fair to the debtor to make him strive to make instalment payments and risk execution for the whole sum at the same time in the event of some default. Compare parallel reasoning in Montgomery and Company v. De Bulmes [1898] 2 QB 420. This appears to be the correct position more so where, as in the present case, the plaintiff is only entitled to execute only for the instalment in default. If the parties intended that execution for whole judgment ought to follow on default in payment of some instalment the consent order should have said so clearly, otherwise such execution can not follow herein on a single default.

The end result is that the plaintiff irregularly executed for the whole judgment debt herein. The plaintiff was only entitled to execute for the sum of K500,000.00 that was in default. Consequently, the plaintiff shall bear and reimburse the defendant Sheriff fees for the execution herein in excess of the K500,000.00.

The reimbursement shall be effected herein within 21 days of this order. The actual sum shall be worked by the sheriff officer involved herein within the next 7 days of this order.

And for purposes of avoidance of doubt the position as stated herein shall apply with regard to any default on instalments viz that execution can only issue with regard to the instalment in default.

Costs are for the defendant.

Made in Chambers at Blantyre this 29th July, 2004.




M A Tembo
ASSISTANT REGISTRAR