IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 70 OF 2007

BETWEEN

DAURTE JOSE HYDE DA COSTA ..... APPLICANT

-AND-

PETER MHONE ..... RESPONDENT

CORAM : **T.R. Ligowe : Assistant Registrar**

Malera : Counsel for the Applicant

Kalua : Counsel for the Respondent

RULING

This is the applicant's summons to vacate a warrant of distress for rent and writ of possession of land.

On record is a warrant of distress and writ of possession combined issued by the respondent against the applicant.

I would like to start by repeating my observation in ***Khumbu Properties ltd v. Mr. Hachim***, Civil Cause No. 9 of 2007, Lilongwe registry (unreported) that distress for rent is not a court process although it is exercisable by a court

certified bailiff. In that case I quote **Megarry's Manual of The Law of Real Property, 6th Edition by David J. Hayton** page 366 where it is said:

> "The subject of distress is extremely intricate, and all that need be said here is that in essence it consists of the right of the landlord, exercisable without application to the court but ordinarily exercised by a court certified bailiff, to enforce payment by seizing and selling enough of any goods found on the premises"

And I further said:

> "The law governing distress for rent in this country is the English Law of Distress Amendment Act 1888. There was an issue in ***Gurmair Garments Manufacturing (EPZ) Ltd in Liquidation and Crown Fashions Ltd v Ismail Properties Ltd,*** MSCA Civil Appeal No 29 of 2006 (unreported), as to whether the law is that Act or sections 21 and 5 of the Sheriff's Act. The Court held:
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> > "After considering oral and written argument of counsel for the appellants and respondents our clear position is that the English Law of Distress Amendment Act 1888 is an Act of general application and that, in the absence of local statute governing distress for rent in Malawi, it applies in this country. We do not think that the Sheriffs Act was intended to regulate distress for rent in this country. We, therefore, agree with learned counsel for the appellants that where distress for rent is concerned, the relevant and applicable law is the 1888 English statute of Law of Distress Amendment Act."
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> Although the practice obtaining in this country is slightly different from the one in England, it remains that distress for rent is not an action brought before the courts. You will notice that notices and warrants of distress for rent are issued without being registered as a case. A warrant of distress and a notice of distress for rent are obtained from the Sheriff of Malawi who also is the Registrar of the High Court and Supreme Court

of Appeal and actual distress is levied by the Sheriff or a person authorized by the Sheriff or a bailiff.

Section 7 of the Law of Distress Amendment Act provides among others, for a remedy in case of distress contrary to the provisions of the Act. The last paragraph of the section provides:

> "If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorised him so to levy, shall be deemed to have committed a trespass."

This is just one instance of illegal distress. An illegal distress is one which is wrongful at the very outset, that is to say, either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. In such a case the distrainor is a trespasser *ab initio*. (See ***Attack v Bramwell*** (1863), 3B. & S. 520) There are so many instances of illegal distress but one other is what is being alleged to have happened in the present case, a distress when no rent is in arrear. The remedies for illegal distress are rescue, replevin or action for damages. (**12 Halsbury's Laws 3rd Edn** Para. 295). I need not discuss the remedies for purposes of this ruling, suffice to say that in case a tenant is aggrieved by the distress the remedy is, apart from rescue, in the tenant taking action against the landlord or bailiff in court, with the possibility of an injunction where appropriate. Remember I said earlier on that distress for rent is not a court process. The aggrieved tenant therefore will start the process.

Thus in the present case we can not talk of setting aside the warrant of distress for rent. The tenant should have brought an action for replevin or for damages and perhaps seek for an interim injunction if need be. The action then would have proceeded normally and give chance for

> discovery and oral evidence, counsel for the tenant lamented about. In fact we have a classic example in Malawi, ***Gurmair Garments Manufacturing (EPZ) Ltd in Liquidation and Crown Fashions Ltd v Ismail Properties Ltd,*** *op cit.* The first appellant in that case claimed for damages for trespass and for seizure and detention of certain goods in case of a distress they thought was illegal."

Similarly in the present case, we can not talk of vacating the warrant of distress for rent in the way the applicants would like to do when the law provides for the rightful remedy as stated above.

The writ of possession of land in the present case must have been misconceived by the party who issued it. A writ of possession of land can only be issued after a successful court action properly commenced according to the rules of procedure. It cannot be issued the same way as a warrant of distress for rent. So, it was wrong to issue it that way. It cannot stand.

Reading the affidavit in support of the application, the applicant was meant to apply to vacate the warrant of execution and the writ of possession on the ground that he had never entered into a tenancy agreement with the respondent. In view of the discussion above, the application is dismissed with advice to follow the right procedure.

Each party bears his own costs.

Made this 18th day of March 2008.

T.R. Ligowe

ASSISTANT REGISTRAR