



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 2851 OF 2006**

**BETWEEN:**

**SUNDUZWAYO MADISE.....PLAINTIFF**

**-AND -**

**MCTU AND NATIONAL BANK.....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA**

Absent, of Counsel for the plaintiff

Mr Chinkango, of Counsel for the defendant

Mr Manda – Official Interpreter

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**R U L I N G**

**Twea, J**

This is an application by the judgment debtor to set aside a garnishee order absolute made under Order 49 rule 4/3. It is supported by an affidavit.

The judgment creditor filed an affidavit in opposition.

The facts of the case were that the judgment creditor obtained summary judgment against the debtor in the sum of K554, 096.95 plus costs and interest. After assessment of costs and interest the total judgment debt came to K1, 577, 088 .39. The judgment creditor applied to have the debt paid by instalment.

On the appointed date, the judgment debtor did not appear to prosecute the summons. The summons was then dismissed for want of prosecution on application of the judgment creditor.

The judgment creditor then applied for and was granted a garnishee order nisi, for all monies held by the garnishee on behalf of the judgment creditor. The garnishee confirmed attaching K2, 824,153.95 in one of the accounts it held for the judgment debtor. The judgment creditor then applied for and was granted as Garnishee order absolute. The judgment creditor now seeks to have this order set aside.

The judgment creditor averred that there was an error when the garnishee confirmed the funds. It is contended that the funds in issue are trustee accounts and not controlled by the debtor. The debtor relied on the case of *Moore Vs Peachey (1892) 66 L. T. 198* on mutual mistake.

The creditor opposed the application and contended that there was no error and that, in any case, there was no mutual error. The case of *Moore* therefore does not apply.

I have considered the affidavits and submissions made by the parties. I agree with the creditor. The case of *Moore* does not apply. The garnishee order nisi was of general application: for any monies held by the garnishee in favour of the debtor. The debtor averred that the account in issue held monies reserved for payment of gratuities to permanent members of its staff. Clearly, the debtor has beneficial interest in the monies. It would have been a different case if the debtor had no beneficial interest in the funds. In the present case the funds are held in an account of the debtor and the funds are there for the benefit of the debtor. There was no mistake in attaching he said funds. For this reason I find the order absolute was justified at law.

The application to set aside the garnishee order absolute, therefore, must fail. I so order.

Costs to the creditor.

***Pronounced in Chambers*** this 17<sup>th</sup> day of April 2008 at Blantyre.

E. B. Twea

**JUDGE**