MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 118 OF 2015

BETWEEN:

ALICE JUMA MALIDADI.....PLAINTIFF/JUDGMENT CREDITOR

-AND-

MALAWI HOUSING CORPORATION.....DEFENDANT/JUDGMENT DEBTOR

CORAM: TAMANDA C. NYIMBA: Assistant Registrar
Mickeus / Kamkwasi : Counsel for the Plaintiff / Judgment Creditor
Katangwe / Matumbi : Counsel for the Defendant / Judgment Debtor
Mrs. Phombeya : Court Clerk and Official Interpreter

RULING

1.1 The question this Court has to resolve in this ruling is whether the plaintiff should be granted a garnishee order absolute on the funds of the defendant held at various commercial banks or this Court should rule in the manner prayed by the defendant that the relevant judgment debt be paid into court. In this ruling the plaintiff and the defendant shall also be referred to as judgment-creditor and judgment-debtor respectively.

1.2 I must state at the outset that I intensely hoped that I would be able to synopsize the history of this matter so as to make the ruling herein as brief as possible. Unhappily, I have been unable to avoid presenting a comprehensive narration of the background in view of the fact that the same is essential for the parties to fully appreciate the finding this Court makes in the final analysis.

1.3 On 19th March 2015, by way of a generally endorsed writ of summons, the plaintiff commenced proceedings against the defendant claiming a permanent injunction order restraining the defendant, its agents and/or

servants from evicting the plaintiff from house number KJ 240, damages for trespass, damages for inconvenience and costs of the action. The defendants did not deliver a defence. Consequently, on 4th August 2015, a default judgment was entered in favour of the plaintiff.

1.4 Next, the matter was set down for assessment of damages on 9th June, 2016. Correspondingly, the defendants took out a summons to set aside the plaintiff's default judgment which application was equally returnable on 9th June, 2016. At the hearing of the aforementioned two applications before my sister Assistant Registrar, Her Honour Kanthambi, it transpired that Counsel for the plaintiff excusably appeared late. In the circumstances, the Court ruled and directed that the defendant's application be prudently brought before a Judge it having been observed that the default judgment was entered by a Judge.

1.5 Regarding the assessment of damages proceedings, the Court decided to adjourn the same *sine die*. I should remark that it is fairly easy to appreciate or justify the open-endedness of the adjournment in this regard because surely a determination of the defendant's application to set aside the default judgment would inform whether or not damages would proceed to be assessed.

1.6 Surprisingly, with due notice to the defendant, the plaintiff caused assessment of damages proceedings to be conducted on 30th June, 2016[1]. At the said hearing, the defendant or its counsel did not appear. The Court proceeded to hear evidence from the plaintiff. Thereafter the Court, in summary fashion, awarded the plaintiff a global sum of MK3,000,000.00 as damages for inconvenience, embarrassment and trespass to property.

1.7 On 13th July 2016 the defendant, without notice to the plaintiff, obtained a stay of execution of the order on assessment of damages. On 20th July 2016, with notice to the defendant, the plaintiff brought an application to set aside the stay order. The plaintiff's application was returnable on 29th July 2016 but on this day, yet again, neither the defendant nor its counsel

[1] I say "surprisingly" advisedly because I was under the impression that the assessment of damages proceedings were adjourned *sine die* for the reason that they hinged on whether the Judge would dismiss the defendant's application to set aside the plaintiff's default judgment in which case the latter would proceed to have the damages assessed or whether the Judge would rule in favour of the defendant by setting aside the default judgment which would automatically result in annihilation of the assessment of damages hearing.

bothered to attend hearing. The Court, having been satisfied that the defendant's absence was on this occasion inexcusable, went on to hear the plaintiff's application and made an order setting aside the earlier stay obtained by the defendant.

1.8 On 15th August 2016 the plaintiff in her capacity as a judgment-creditor brought an ex-parte application for a garnishee order *nisi* on the funds of the judgment-debtor held at ascertainable commercial banks. I granted the order. Further, the relevant garnishees were ordered to attend my Court on 6th September 2016 for hearing of the judgment-creditor's application for the garnishee order *nisi* to be made absolute.

1.9 On 1st September, 2016 the judgment-debtor brought an ex-parte application for stay of execution of the order on assessment of damages, the garnishee proceedings and the garnishee order *nisi* on the grounds that the order on assessment was entered in the defendant's absence and that there is a summons to set aside the plaintiff's default judgment pending before the Judge. Deputy Registrar Usiwa-usiwa, as he then was, who handled this particular application directed that the same come *inter partes*. He proceeded to hear the application on 5th September 2016 on which day he dismissed it on the grounds that a similar application was before Her Honour Kanthambi on 29th July 2016 to which her Court granted an order setting aside an earlier stay given on 13th July 2016 and further that after the said order no appeal or application for re-hearing was lodged by the defendant as per the applicable rules and procedure. He thus concluded that the Master's order on assessment of damages still subsisted unless appealed.

1.10 On the morning of 6th September 2016 the defendant, without notice to the plaintiff, put in yet another application for stay pending rehearing of the summons to set aside the stay order on assessment of damages. The application was before Her Honour Kanthambi who correctly observed that, to all intents and purposes, it was similar to the application dismissed by the learned Deputy Registrar Usiwa-usiwa, as he then was, on 5th September 2016.

1.11 Rather surprisingly and perhaps having inadvertently failed to notice that my Court was on this very day set to determine whether to grant the plaintiff a garnishee order absolute, Her Honour Kanthambi upon noting the defendant's yet to be heard application to set aside the plaintiff's default judgment, ruled that she was of the view proceeding with execution in the prevailing circumstances was likely to prejudice the interests of justice. She therefore equally declined to stay execution but went further to order that the judgment debt be paid into court pending a proper determination of the matter on the merits.

1.12 It was immediately after this particular ruling, on 6th September 2016, that the parties herein appeared before me for what I understood to be and dealt with as a hearing of the judgment-creditor's application for the garnishee order *nisi* to be made absolute.

1.13 When Counsel Mickeus, for the judgment-creditor, argued that the garnishee order *nisi* be made absolute as adequate funds were available to honour the judgment debt, Counsel Matumbi, for the judgment-debtor, brought the Court's attention to the earlier order made by Her Honour Kanthambi respecting payment of the judgment debt into court. He thus prayed that the garnishee order absolute be in keeping with Her Honour Kanthambi's order.

1.14 Counsel Mickeus countered by contending that the judgment-debtor's application before Her Honour Kanthambi was an abuse of court process and *res judicata* as it had been brought on three occasions and dismissed twice by Deputy Registrar Usiwa-usiwa, as he then was, as well as Her Honour Kanthambi. For good measure, Counsel Mickeus argued that he saw no basis on which Her Honour Kanthambi ordered that the judgment debt be paid into court.

1.15 After hearing these arguments and, importantly, upon noting the back and forth range of applications that went on in this matter heretofore, I prudently reserved ruling so I could take time to appreciate the exact state of the applications and all orders made thereunder.

1.16 Much as I would want to cut to the chase as I do not want to unnecessarily cloud my reasoning (insofar as the instant application is concerned) with an

analysis of everything that should or should not have taken place in respect of the litany of applications before my fellow Registrars, I deem it important to observe that the manner in which the flurry of applications herein were processed leaves a lot to be desired. Certainly they could have been managed better.

1.17 Be that as it may, a question that I can render swift and emphatic opinion on is the very last application for stay before Her Honour Kanthambi. This application should have been dismissed out of hand for being decidedly an abuse of court process and *res judicata*. In fact and in law, the Court had no basis to make the order for payment of the judgment debt into court more so considering that there was an application pending before my Court regarding the very issue of whether or not the money was to be paid to the plaintiff to satisfy the judgment debt. The long and short of it is that, in agreement with the plaintiff's counsel and supported by the foregoing reasons, the impugned order in this regard is hereby set aside.

1.18 I now move on to deal with the central question that requires resolution in this action as identified in the first paragraph to this ruling. Without holding the parties in needless suspense, I am inclined to decide in favour of the judgment-debtor and hold that the judgment debt be paid into court until determination of the defendant's application to set aside the plaintiff's default judgment. My reasons for so holding are as follows.

1.19 To start with, I have vainly cogitated and ruminated as to why, the assessment of damages proceedings having been wisely adjourned *sine die* on 9th June 2016, the plaintiff inexplicably caused the same to be conducted on 30th July 2016. In my conscientious view I would have thought that, logically, an assessment of damages in this matter was dependent on whether or not the defendant's application to set aside the plaintiff's default judgment carried the day. For what it is worth, when one glances at the defence already filed by the defendant, one cannot help to notice that it is quite a formidable defence so much that it has more than a remote chance of succeeding in persuading the Judge to set the plaintiff's default judgment aside.

1.20 Secondly, I respectfully observe that following the assessment of damages proceedings, an order was rendered at a somewhat breakneck speed in, perhaps predictably, a summary fashion. The order was couched thus:

"ORDER ON ASSESSMENT

UPON *hearing and analyzing evidence on assessment of damages herein* ***AND UPON*** *considering the Skeleton Arguments filed and adopted in support of the assessment, it is this court's view that the sum of* ***MK3,000,000.00 (Three Million Malawi Kwacha)*** *will reasonably compensate the Plaintiff herein. It is therefore ordered that the Defendant do pay the Plaintiff* ***MK3,000,000.00 (Three Million Malawi Kwacha)*** *as damages for inconvenience, embarrassment and trespass to property. The Defendant is ordered to pay the damages herein within the next* ***fourteen (14) days*** *from the date hereof. Costs are for the Plaintiff." (Emphasis in original).*

1.21 Pausing here, and with profound respect, looking at the terms of this particular order it appears to me that, *prima facie,* it lacks a judicious and conscientious attempt to present a sound basis by which the court arrives at or justifies the global award of MK3,000,000.00 as appropriate damages. This order is, in my view, disturbing when one takes into account that there were three distinct heads of damages that called for assessment. In saying this I acutely recognize that the defendant shirked attending the assessment of damages proceedings so that the court had nothing to consider from the defendant's side. But, in my considered opinion, that did not confer the court carte blanche to render an unreasoned order or to make an award which is incapable of analysis.

1.22 In this context, it is perhaps apposite that I quote *in extenso* a passage in the case of *John Maulidi v. Enock Malindi and Prime Insurance Company Limited*[2] wherein Kamwambe J had this to say respecting situations where no evidence is forthcoming from the defence:

"There is nothing to consider as evidence from the Defendant's side. The court does not argue on behalf of any party. It must play its neutral role so

[2] HC (PR) Civil Cause Number 1773 of 2009 (unreported)

that there is no smell or appearance of bias just because one party is not there. However, the interests of the [party who has tendered no evidence][.....] shall be safeguarded. The Plaintiff should prove each and every averment he makes on a balance of probabilities. The court should convince itself that this position is reached. It is not automatic that Plaintiff has the day, just like that, just because the other party has tendered no evidence, [.....]. The court should closely consider and scrutinise Plaintiff's evidence in case there are some material contradictions. There could also be material omissions".

1.23 An exact situation obtains in the present matter since there was nothing to consider as evidence from the defendant's side on assessment of damages. Consequently, on the authority of the aforecited case of *John Maulidi v. Enock Malindi and Prime Insurance Company Limited*[3] it seems to me that prudence and indeed for justice not only to be done but to be seen to be done, it was incumbent on the court to make an attempt, however minimal, to present its reasoning clearly and lay bare the foundation for its order. It is also fair to surmise that such reasoning would have enriched our jurisprudence in matters relating to assessment of damages for inconvenience, embarrassment and trespass to property.

1.24 In these circumstances, my considered judgment is that if the order on assessment of damages was to be appealed against, it is most likely that the Supreme Court of Appeal where appeals regarding assessment of damages made by Registrars lie would, at best, interfere with the order by reducing the global amount of damages awarded, or at worst, tamper with the order wholesomely by setting it aside. This ineluctably means that it would not serve the interests of justice if the plaintiff was to be paid the judgment debt now when there is a very high probability that either the default judgment could be set aside by the Judge or that the order of assessment of damages could be quashed or the omnibus award decreased by the Supreme Court on appeal.

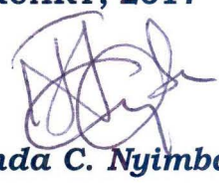
1.25 The foregoing are the reasons grounding my decision in favour of the judgment-debtor. In summary and in the interest of clarity, this Court orders that the judgment debt be paid into court pending determination of

[3] Ibid.

the defendant's application to set aside the plaintiff's default judgment which application is to come before the Judge.

1.26 As to costs, I am aware that the law leaves these in the discretion of the Court but usually costs follow the event. In this case I bear in mind that the event is that the plaintiff has succeeded in certain respects whilst the defendant has been triumphant on the most important point. In the premises, I order each party to bear own costs. Order accordingly.

DELIVERED IN CHAMBERS AT CHICHIRI, BLANTYRE THIS 2nd DAY OF FEBRUARY, 2017



Tamanda C. Nyimba

ASSISTANT REGISTRAR