



JUDICIARY

IN THE HIGH COURT OF MALAWI

**PRINCIPAL REGISTRY
CIVIL CAUSE NO. 401 OF 1999**

BETWEEN

A.B. STORE CHILUMBU PLAINTIFF

AND

G.T. CHAPONDA DEFENDANT

CORAM : HER HONOUR MRS E. BODOLE

Kambale, of Counsel for the Plaintiff

Kumwenda, of Counsel for the Defendant

Ms. Kazembe, Court Clerk

RULING

Introduction

This is an application by the defendant for stay of execution on the order for interest that was made by the Registrar.

Brief Background

The plaintiff commenced the action against the defendant in February, 1999 claiming the balance of purchase price, mesne profits, and damages for breach of

contract, rentals, interest on the balance at 1% above base lending rate and the cost of the action. On 11th November, Justice Chipeta (as he then was) delivered judgment in favour of the plaintiff and awarded the sum of K145,000 interest thereon at the rate of 1% above the base lending rate from 1st July, 1996 to the date of payment and costs of the action.

The defendant being dissatisfied with part of the judgment appealed to the Malawi Supreme Court of Appeal on 6th December, 2013. The defendant is not dissatisfied with the payment of the principal sum and costs.

The Evidence

The defendant brought the application under Order 47 of the Rules of the Supreme Court which states that an order for payment of money may be stayed where

- (a) there are special circumstances which render it expedient to enforce the judgment or the order; and
- (b) the applicant is unable to pay the money.

The defendant's counsel submitted that this is a proper case where a stay of execution should be granted as the above conditions have been complied with. The special circumstances in this case are that the case has taken a long time to be finalized. Firstly there was slumber on the part of the plaintiff to a point where the defendant, after a number of years applied for an order dismissing the matter for want of prosecution. The matter was later revived and was finally heard after 10 years in 2009 from which point there was another delay which was caused by the court. Honourable Justice Chipeta took 4 years to deliver his judgment. The defendant was condemned to pay interest covering the whole period of the existence of the case.

The second circumstance is that the matter emanates from a sale of a house which was transacted in the 1990s for which the defendant paid for the house partly. Then the issue arose about the balance remaining unpaid. The defendant paid the balance in court in 2007. So the principle sum amounting to K145,000.00 was paid out by the defendant. The money is still sitting in court probably earning interest.

The third circumstance is that the appeal has prospects of success. No compound interest was awarded by Justice Chipeta in his judgment. The Honourable Registrar considered inadmissible evidence when he made an award of compound interest.

The fourth circumstance is that the award was irregular in that there was a stay of execution at the time the award on interest was being made. The defendant was not heard during the assessment proceedings.

As regards being able to pay the amount, the defendant submitted that she is unable to pay the sum of money because she is a retiree. She has no means to pay the sum of over K40,000,000.00 which was awarded. The only thing she has is the house she bought and if tampered with and if the appeal succeeds, which it will, the appeal will be rendered nugatory.

The plaintiff's counsel contended that the plaintiff applied to assess interest on 6th March, 2014 but on 23rd April, 2014 the defendant obtained an order of stay of execution pending the determination of the appeal. Ever since the record of appeal was filed, the record of appeal is not ready up to this date. In July, 2015 the plaintiff filed summons to vacate the order of stay and Mwaungulu, JA ordered that the stay order be vacated.

Following the dismissal of the order of stay, the plaintiff filed a notice to assess interest and the court scheduled the hearing on 20th October, 2016. The hearing was adjourned at the request of the defendant's counsel and on other 4 separate occasions. On 31st January, 2017 the defendant's counsel finally appeared and the Registrar heard the parties on assessment of interest. The plaintiff's counsel contended that it is not true that the defendant was not heard on assessment of interest and she just wants to further delay the proceedings and in so doing denying the plaintiff the fruits of his litigation.

The plaintiff's counsel further contended that the subject matter between the plaintiff and the defendant is a house in the affluent part of Blantyre. The defendant would be able to unlock the means of paying the judgment sum if the house is sold. Further, the defendant has so far changed 4 legal houses. So it is not true that she does not have the means to pay the amount.

The plaintiff's counsel further contended that the Registrar did not err in using compound interest rather than simple interest in assessing interest. The Registrar was within the ambit of section 11 of the Courts Act and section 65 of the Courts Act which empowers the court to direct that interest be paid on debts.

As regards the appeal on interest, the plaintiff's counsel further contended that the defendant has appealed to a Judge in chambers. The Judge in chambers has no jurisdiction to hear an appeal on interest- see Elizabeth Moto v Ishmael Sabadia MSCA Civil Appeal No. 2 of 2014. As such there is no appeal in this matter.

The plaintiff's counsel submitted that there are no special circumstances to warrant the granting of an order of staying execution in this matter and prayed that the defendant's application be dismissed with costs to the plaintiff.

Issues

The issues for determination before this court are whether

- (a) the proceedings on the award of interest was irregular;
- (b) there is an appeal as against the award of interest;
- (c) there are special circumstances to warrant the grant of stay; and
- (d) the defendant is unable to pay the money.

Applicable Law

Order 47 of the Rules of the Supreme Court states that an order for payment of money may be stayed where

- (a) there are special circumstances which render it expedient to enforce the judgment or the order; and
- (b) the applicant is unable to pay the money.

Analysis

Whether proceedings on the Award of Interest Was Irregular

The evidence before this court shows that on 23rd April, 2014 the defendant obtained an order of stay of execution pending the determination of the appeal against the judgment of Honourable Justice Chipeta. In July, 2015 the plaintiff filed summons to vacate the order of stay and Mwaungulu, JA ordered that the stay order be vacated. The plaintiff then filed a notice to assess interest and the court scheduled the hearing on 20th October, 2016.

The hearing was adjourned at the request of the defendant's counsel and other 4 separate occasions. On 31st January, 2017 the defendant's counsel finally appeared and the Registrar heard the parties on assessment of interest. I agree with the plaintiff's counsel that the defendant was heard on assessment of interest. Also the hearing of the assessment of interest was done after the stay order had already been vacated. The stay order having been vacated, there was nothing to stop the court from hearing the matter.

Appeal on Award of Interest

The defendant has appealed on the award of interest to a Judge in Chambers. I do not think that this court is the proper court to find the merits or demerits of that appeal as this court is not the one in which the appeal has been lodged. It will be up to the Judge who will handle the matter to find whether or not that application has been properly brought before him.

Special Circumstances for Stay

It is indeed a fact that there is an appeal on part of the judgment of Honourable Justice Chipeta which appeal has not been heard. The appeal concerns the award of interest which covers the whole period of the proceedings i.e. 1999 to date of payment of debt. There is also an appeal on the award of interest of which the Registrar awarded compound interest instead of interest at 1% above bank lending rate as awarded by the Judge. There is also an issue of the principal sum being paid into court in 2007, and the issue concerning the delay of the substantive matter

from 1999 to the date of Judgment. All these are special circumstances for stay within the ambit of Order 47 of the Rules of the Supreme Court.

Defendant's Inability to Pay

The defendant submitted that she is a retiree and will not be able to pay the assessed interest. The only thing she has is the house which she bought and is the subject of the proceedings. If this house is tampered with and if the appeal succeeds, which it will, the appeal will be rendered nugatory. I strongly believe that it would be unfair on the defendant at this stage of the proceedings regard being had to the special circumstances to sell the house and then use the proceeds to settle the amount due.

Findings

I find that the proceedings on the award of interest was regular, there is an appeal on the award of interest, there are special circumstances that warrant the stay of execution of the order of interest, and the defendant is unable to pay the amount she was ordered to pay as interest.

Order

I, therefore, grant the application by the defendant for stay of execution on the order on interest that was made by the Registrar.

Pronounced in court this 16th day of February, 2018 at Blantyre.



E. BODOLE (MRS)

ASSISTANT REGISTRAR