



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 268 OF 2014

Between

COUNTRYWIDE CAR HIRE (2007) LTD..... CLAIMANT

-AND-

TOBACCO CONTROL COMMISSION.....DEFENDANT

Coram: Honourable Mr. Justice J. M. Chirwa

Mr M'bwana of the Counsel for the Claimant

Mr G. Chembezi of the Counsel for the Defendant

Mr O. Chitatu Official Court Interpreter

Ruling

1. Introduction:

This is an application for summary judgment by the Claimant. The application is supported by a sworn statement of **Masauko Timothy Msungama** of Counsel. There are also filed in support of the application Skeleton Arguments.

The application is opposed by the Defendant. A sworn statement in opposition to the summary judgement by **George Desiderio Liwimbi**, of Counsel, has been filed for the purpose. There are also filed in support of the said sworn statement Skeleton Arguments.

2. Background:

By a Writ of Summons (Specially Endorsed) issued on the 23rd day of July, 2014, the Claimant claims the following:

- (i) damages for illegal distress,
- (ii) refund of the sum of MK998, 574. 96 with interest at the bank lending rate from the date it was paid by the Claimant to the date of refund,
- (iii) loss of use of the two motor vehicles,
- (iv) damages for defamation,
- (v) loss of hiring fees in the sum of MK 15, 000, 000. 00 and,
- (vi) costs of the action.

By a Defence dated the 8th August, 2014 the Defendant denies liability to the Claimant for the alleged claims.

3. Issue for Determination

This issue for determination is whether this is a proper case for a summary judgement to be entered against the Defendant?

4. The position of the parties to this application:

(a) The Claimant's:

It is the case of the Claimant that it was illegal for the Defendant to issue a warrant of distress against **Mike Mlombwa t/a Countrywide Car Hire**. It is the further case of the Claimant that the sheriff seized the Claimant's motor vehicles because the warrant of distress issued by the Defendant indicated the party to be distressed as **Mike Mlombwa t/a Countrywide Car Hire**. It is still further the case of the Claimant that as indicated in Section 44(3) of the Sheriff's Act the liability for any illegal execution falls squarely on the shoulder of the person who issues the process and the Defendant having in this case issued the process which contained the name of the Claimant is liable for the Claimant's claim.

(b) The Defendant's:

It is the case of the Defendant that in as far as it filed a warrant of distress and properly described the premises to be distrained upon, it never erred, notwithstanding the fact that it cited the party to be distressed as **Mike Mlombwa t/a Countrywide Car Hire**. It is the further case of the Defendant that the warrant of distress was very correct in substance and clearly prohibited the Sheriff from levying distress over property which is not the subject matter of distress. It is still further the case of the Defendant that even if the distrained party were properly cited it would have been improper for the Sheriff to seize the Claimant's motor vehicles, and even if he did, that would not have been its liability.

It is otherwise, generally, the contention of the Defendant that the Defence thus raises valid arguable points of law and that this is thus not a proper case where a summary judgment can be entered. The Defendant thus prays for the dismissal of this application with costs.

5. The Law:

Order 12 Rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules ("the CPR") gives a claimant the right to apply to the Court for summary judgment where the Defendant has filed a defence but the Claimant believes that the Defendant does not have any real prospect of defending the claim. The obtaining of a summary judgement is however, prohibited where the claim is for libel, slander, false prosecution, false imprisonment, seduction or an admiralty action *in rem* by Rule 23(2) of the said Order. This sub- rule provides as follows:

"(2) Summary judgment shall not apply to a claim for libel, slander, false prosecution, false imprisonment, seduction or an Admiralty action in rem."

The Court has however, generally, the jurisdiction to enter a summary judgment under Rule 25(2) of the said Order. This sub-rule provides as follows:

"(2) where the Court is satisfied that-

(a) The Defendant has no arguable defence to the claim or part of the claim as presented in the application; and

(b) There is no need for a trial of the application or that part of the application, the Court shall-

(i) give judgement for the applicant for the application or part of the application, and

(ii) make any other order the court may deem appropriate".

In a case where the Court is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law a summary judgment cannot be entered against a Defendant. This is specifically prohibited by Rule 26 of the said Order which provides as follows:

"(26) The Court shall not enter summary judgment against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law".

6. Determination-

It is not in dispute that the Defendant caused a warrant of distress to be issued against **Mike Mlombwa t/a Countrywide Car Hire** for the sum of MK4, 800. 000. 00 being arrears of rent. It is also not in dispute that the said warrant required the Bailiff to distrain such of the goods and chattels as may be lawfully distrained for rent in and upon Plot Number 10/470 Area 10 in the City of Lilongwe (see Exhibit "MTM 2" to the sworn statement of **Masauko Timothy Msungama**). It is also not in dispute that Countrywide Car Hire Limited is a limited liability company and has a distinct and separate legal identity from its stakeholders or Managing Director. It is also not in dispute that the Bailiff pursuant to the said warrant of distress seized and removed the Claimant's motor vehicles registration numbers MN2180 and MN3215 when the same were being driven on public roads within the City of Lilongwe. It is also not in dispute that the said seizure of the Claimant's said vehicles was illegal.

What seems to be in contention is whether the Defendant is liable to the Claimant for such a distress carried out not in pursuance of the Defendant's specific instructions, to wit, "to distrain such of the goods and chattels as may be lawfully distrained for rent in and upon Plot No. 10/470 Area 10 in the City of Lilongwe.....". This dispute, in this Court's considered view, is a relevant dispute about a question of law. The Court is by Rule 26, aforesaid, prohibited from entering a summary judgement against a defendant in such a case.

Upon a careful reading of the Specially Endorsed Writ of Summons (Exhibit "MTM 4" to the sworn statement of **Masauko Timothy Msungama**) it is evident that the Claimant's action includes a claim for damages for defamation (vide paragraphs 7 and 10(iv) of the Statement of Claim). By Rule 23(2), aforesaid, the Court is also prohibited from entering a summary judgment against a defendant in such a case.

As regards the Claimant's alternative prayer for a judgment on admission, it is the considered view of this Court that given the relevant dispute between the parties hereto this is thus not a proper case where such a judgment can be entered. Such a dispute cannot be effectively disposed of on summons for admission.

7. Conclusion:

In conclusion, this Court thus finds that this is not a proper case where a summary judgment or a judgment on admission can be entered against the Defendant. Consequently, this Court proceeds to dismiss the Claimant's Summons for Summary Judgement and/ Judgment on Admission.

8. The Costs:

The costs are the discretion of the Court (vide Order 31 Rule 3(4) of the CPR and as per sub-rule (2) of the said Rule the unsuccessful party shall be ordered to pay the costs of the successful party. In the present application while the Claimant happens to be the unsuccessful party, the Defendant is the successful party. In the exercise of its discretion on costs it is now the order of this Court that the Claimant should pay the costs of the Defendant. It is so ordered. The said costs shall be assessed by the Taxing Master in the event that the parties hereto shall fail to reach an amicable agreement on the same. It is further so ordered.

Dated this 29th day of August 2018.

A handwritten signature in dark ink, appearing to be 'J. M. Chirwa', written over a horizontal line.

JUDGE