



**IN THE HIGH COURT OF MALAWI  
LILONGWE REGISTRY  
CIVIL DIVISION  
CIVIL CASE NO. 232 OF 2018**

**BETWEEN:-**

**SHAKEEL KARA..... CLAIMANT**

**-AND -**

**LAKE TRANS LIMITED.....DEFENDANT**

**Coram:**

**Brian Sambo, Assistant Registrar**

Mr. Marshal Chilenga, of counsel for the Claimant.

Mr. Yahya Aman Kunje, of counsel for the Defendant

Mr. Matope, Court Clerk/Official Interpreter

**RULING**

This is my ruling on the application by the Defendant to stay execution pending an application to set aside a Seizure and Sale Order. Before I go any further, a brief background of the matter suffices.

On 22<sup>nd</sup> of November, 2018 the Claimant had successfully obtained a default judgment for the following;

- i. General damages for loss of business
- ii. Cost of maintenance of trailer and tarpaulins in the sum of MK5,033, 965.00
- iii. Cost of repairs of truck in the sum of MK19,433, 965.00

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- iv. Loss of use in the sum of MK1,600,000.00 per month to date of payment and
- v. Cost of action.

Following the default judgment, on the 11<sup>th</sup> of January, 2021 the court made an assessment of damages, and the Defendant was ordered to pay the Claimant a total sum of **MK73, 486,562.00**.

Following the order on assessment of damages, on 28<sup>th</sup> of January, 2021 an order for enforcement was granted on application by the Claimant. On 4<sup>th</sup> May, 2021 the Claimant obtained a Seizure and Sale Order which was, immediately given to the Sheriff of Malawi in order for them to carry out an execution upon the Defendant.

On 30<sup>th</sup> March, 2021, the Defendant filed their defence without leave to file it out of time.

On 11<sup>th</sup> May, 2021 the Defendant appointed Messrs Silungwe Law Consultants, who, on 28<sup>th</sup> of May, 2021 filed an *interparte* application to set aside a default judgment; made under Order 10 r 21 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter 'the CPR, 2017'). The application was granted on the same day in the following terms;

- i. THAT the execution of the default judgment herein as well as proceedings to assess costs herein be stayed pending hearing of the application to set aside the default judgment.
- ii. THAT the application to set aside the default judgment herein be filed within 7 days from the date of this order; failing which the default judgment would still stand.

On 7<sup>th</sup> of October, 2021, the Defendant filed the application to set aside the said default judgment which was heard by Her Honour M. Chimwaza, in the absence of the Defendant, on 21<sup>st</sup> of October, 2021. The Court, having heard counsel for the Claimant, dismissed the application with costs to the Claimant. The application was dismissed on the ground that there was inordinate delay by the Defendant of about 3 years.

On 21<sup>st</sup> October, 2021; basically on the same day the application was dismissed with costs, the Defendant filed an application without notice to restore proceedings. Their application was duly supported by a Sworn Statement by Mr. Yahya Man Kunje who deponed that the Defendant's failure to attend the hearing

of their own application was not by design but they missed the venue of the court; they thought the application would be heard at Area 4 where there is Civil Division of the High Court only to be informed that the application was heard at Area 3.

Upon hearing counsel for the Defendant and upon reading the Sworn Statement in support of the application, the court, on 21<sup>st</sup> of October, 2021; basically on the same day the application to set aside the default judgment by the defence was dismissed, the matter was restored on the terms above-stated.

Meanwhile, on 25<sup>th</sup> November, 2021 the Sheriff of Malawi reported that they had, in furtherance of the Seizure and Sale Order of 4<sup>th</sup> May, 2021, made an execution. The same was successfully carried out and 2 motor vehicles belonging to the Defendant were seized, *viz*; Howo Tanker Registration Number T518 DLV and Scania Tanker Registration Number T545 DJY plus 37,000 litres of fuel. The total levy thus including Sheriff Fees and Expenses came up to **MK91, 012,800.30**.

Following the above execution, on 26<sup>th</sup> November, 2021, the Defendant filed an application without notice for stay of execution pending the application to set aside the Seizure and Sale Order; brought under Order 10 rule 3 of the CPR, 2017. Owing to the circumstances of this case, I ordered the Defendant to bring the application *interparte* on the 26<sup>th</sup> of November, 2021 at 2 PM; the same day it was filed.

Before hearing the application, the parties had a discussion outside the court and agreed to come up with a consent order to the extent that the 2 fuel tankers be, immediately collected by the Defendant. The fuel should be offloaded at the Defendant's intended place of disposal and that the proceeds from the sale or disposal of the fuel be deposited with the court until the conclusion of the matter. This position was confirmed by both parties.

True to the above, before close of business on the 26<sup>th</sup> of November, 2021, the parties filed a consent which I validated on the same day. The consent order was in the following terms:

1. THAT fuel be delivered to its normal destination under the supervision of the Sheriff of Malawi for sale.
2. THAT the Sheriff of Malawi shall receive all the proceeds of the said fuel from the purchaser or recipient of the fuel.

3. THAT the purchaser of the said fuel shall pay the Sheriff of Malawi who shall retain the proceeds thereof pending settlement discussions between the parties to be concluded within 7 days from the date hereof.
4. THAT the tankers be released to the Defendant after offloading and receipt of the proceeds of the fuel.
5. THAT the parties hereto shall conclude settlement of the matter within 7 days from the date, failure of which the Sheriff of Malawi shall retain the proceeds from the sale to the Claimant.
6. In the event, the parties have not reached a settlement agreement at the conclusion of the said 7 days then the Sheriff of Malawi shall release the proceeds of fuel sales to the Claimant at the end of the said 7 day period.
7. THAT the Defendant shall bear all the Sheriff Fees and expenses in the matter.
8. THAT the Claimant shall bear costs of action.
9. Save for the enforcement of this order, the within action is hereby withdrawn.

Both parties signed the consent.

Two days later, the Defendant filed a Certificate of Extreme Urgency; certifying that the property that were seized by the Sheriff of Malawi belonged to a 3<sup>rd</sup> party. He filed this along with an *ex parte* application without notice for stay of execution pending an application to set aside Warrant of Execution; still brought under Order 10 rule 3 of the CPR, 2017. Looking at the provenance and circumstances of the matter, I nevertheless, ordered the Defendant to bring the application *interparte*.

I heard the application *interparte* on the 30<sup>th</sup> of November, 2021. Counsel for the Defendant submitted that the execution herein was erroneous because it was carried out after the order restoring the matter was already granted. He further told the court that the 2 tankers were full of fuel, and looking at the nature of these goods, he said they were prone to evaporation, and at the same time dangerous looking at the place where they were being kept. He asked the court to release them on payment of sheriff fees and expenses. Counsel further told the court that the Defendant was retracting what they alluded to in the consent order to the extent that they did not have title to the fuel carried in the tankers. He said the fuel belonged to the 3<sup>rd</sup> party and therefore it was difficult for them to bring the proceeds of sale of the same to the court as agreed in the consent order. He said the Defendant was only a transporter in contract with the said 3<sup>rd</sup> party to ferry the said goods. He thus prayed that the court should invalidate and set aside the said consent order.

In response, counsel for the Claimant stated that the consent order of the 26<sup>th</sup> of November, 2021 was still valid and could not be invalidated let alone be set aside unless by an independent matter. He cited *The Registered Trustees Small holder Farmers Fertilizer Revolving Fund of Malawi vs Tobacco Association of Malawi*, Civil Cause No. 2357 of 1997 (HC-Principal Registry) where he said the High Court held that a consent order could not be set aside unless through fresh and separate court proceedings. Counsel further cited *African Commercial Agency vs Attorney General*, Commercial Case No. 61 of 2018, and also the case of *Ship Trade International Company Limited vs Transglobe Produce Export Limited*, (1997) MLR, 87 at 89 for the same proposition. He submitted that, in view of these authorities, the Defendant's application to set aside the consent order could not stand and therefore should be dismissed with costs.

Responding on the issue regarding the 3<sup>rd</sup> party owning the fuel, Counsel Chilenga stated that Order 29 of the CPR, 2017 placed the responsibility on the 3<sup>rd</sup> party to challenge an execution by the sheriff by way of filing interpleader summons. He said the Defendant herein could not plead on behalf of the said 3<sup>rd</sup> party. He submitted that in the absence of the 3<sup>rd</sup> party the court should not entertain the defendant's assertions that are aimed at denying the Claimant fruits of his successful litigation.

On the issue of missing the court venue, Mr. Chilenga submitted that it was no longer an issue in view of the consent order on the court record. He said, moreover, in dismissing their application, the court found that there was an inordinate delay of about 3 years. He said, even if the Defendant could say that they went to Area 4 instead of Area 3, the issue of inordinate delay could not be cured.

Coming to the issue of their application to set aside the default judgment, he observed that the court ordered the Defendant to file the same within 7 days but the Defendant did not comply. Instead they filed their application on 28<sup>th</sup> October, 2021; which was more than 6 months since the order was made by the court. He said it would therefore be unfair to the Claimant for the Defendant to be insisting on the said application when they had failed to comply with the order of the court to file their application within 7 days.

He said the Defendant had no basis for staying execution let alone the Warrant of Execution. He submitted that their application should be dismissed with costs to the Claimant.

Lastly, on the issue of Sheriff Fees and Expenses, Counsel Chilenga asked the court to revert to the consent order on the court record; which was clearly placing the responsibility to pay the same on the Defendant herein.

Counsel for the Defendant, in response to the issues raised by counsel for the Claimant, he told the court that their initial application to set aside the default judgment was filed within time, only that the court had returned the documents to them for correction of some filing errors. He said the matter was only dismissed in their absence because they came to Area 4 instead of Area 3 where the application was heard. He said, when they applied for restoration of the proceedings, the court agreed with them and restored the matter on the same day their application was dismissed in their absence.

On the issue of the requirement for the 3<sup>rd</sup> party to commence interpleader proceedings, he said he was aware of the provisions of order 29 of the CPR, 2017 but he thought, because of the urgency of the matter, he had to alert the court quickly, knowing that interpleader hearing might take time to finish.

On the issue of the consent order, he said the facts contained therein were wrong and could not be acted upon. He said the goods in the tankers belonged to the 3<sup>rd</sup> party and the consent order did not recognize this fact hence the need for setting aside the whole of it. He said the consent was entered by mistake.

To this end, I adjourned the matter to a later date for my ruling. I however, urged the parties to observe the *status quo*. That the consent order was still valid unless the court ordered otherwise, and therefore the parties should endeavor to execute the consent order as validated, to *wit* that the tankers should be collected by the defendant, immediately on the same terms spelt out in the consent order, provided always that the proceeds should still be deposited with the court. That the empty tankers should be retained by the Defendant on full payment of the Sheriff Fees and Expenses. I went ahead to offer the Defendant alternatives; of which the first one was for them to pay the judgment sum plus the Sheriff Fees and expenses *under protest*, and immediately collect the seized goods. The effect of the payment done *under protest* was that the payment would be regarded as court deposit to be withdrawn upon full determination of the matter by either of the parties. I then adjourned the matter to 3pm on the same day so that the Defendant decided on the option to go for. On reconvening at 3pm, counsel for the Defendant applied for a further adjournment to the following day so that he had time to discuss with his client regarding the options

offered by the court. I adjourned the matter to the following day, the 1<sup>st</sup> of December, 2021 at 2 pm for the Defendant to report on the preferred alternative.

When we met on the 1<sup>st</sup> of December, 2021, counsel for the defence reported that the Defendant had not gone for any of the two options, and had decided to wait for the court's ruling. He said the problem was that the Defendant was a mere transporter and the goods in the tankers belonged to the 3<sup>rd</sup> party. He asked the court to stop the Sheriff of Malawi from selling the seized items which included the 2 tankers and the fuel in them.

Counsel for the Claimant told the court that he had been available and willing to reach a compromise with the Defendant but they had been avoiding him. He said all these times that the court had been adjourning the matter to pave way for discussion between the parties, the Defendant had never taken up any step to meet him for discussion. He said they had been avoiding him, and he wondered as to how a compromise could be made when the Defendant was unwilling to talk. He asked the court to proceed with its ruling while allowing the effects of the consent order on the court record to prevail.

I instantly made my ruling with regard to the Defendant's request to stop the Sheriff from selling the seized goods. My view was that the Sheriff Act allowed the Sheriff of Malawi to sale seized goods by auction after 10 days, and that the court could not order otherwise especially at the fact that the goods in question were perishable and dangerous. The court did not have the capacity to keep such goods, and the only wisest thing to do was to allow the Sheriff of Malawi to proceed selling the items without further notice.

Now, the issues to be dealt with in the present ruling are as follows;

1. Whether the execution herein is irregular and has to be stayed and the Seizure and Sale Order set aside pending the application to set aside the default judgment.
2. Whether the consent order herein could be set aside pending the application to set aside the default judgment.

Beginning with the first issue, the answer lies in the order by Hon Chimwaza restoring the proceedings on condition that the Defendant filed the *interparte* application to set aside the default judgment within 7 days failing which the default judgment would subsist. This order was made on the 28<sup>th</sup> of May, 2021. If the order is anything to go by, the Defendant was supposed to file their application on or before the 4<sup>th</sup> of June, 2021. However, the Defendant filed on

26<sup>th</sup> November, 2021; 6 months later. Obviously, according to the order above, the default judgment returned to its full effect on the 5<sup>th</sup> of June, 2021, after the Defendant had failed to comply with the order. Therefore, any execution by the Sheriff of Malawi after the 5<sup>th</sup> of June, 2021 was not irregular.

The execution report by the Sheriff of Malawi clearly indicated that the two tankers with fuel were seized on the 25<sup>th</sup> of November, 2021. Therefore, the execution was regular, and the Sheriff of Malawi is entitled to full Sheriff Fees and expenses payable by the Defendant herein.

Regarding the consent order available on the court record; when a party is trying to set aside a consent order he or she is only saying that it should be set aside because of:

- Duress or undue influence;
- Mistake; or,
- Something exceptional that happened after the order.

The truth remains that successful applications to set aside consent orders are rare. This is because the whole aim of the process is to bring issues before the court to an end. There are a number of ways a consent order could be set aside.

A consent order can be set aside for non-disclosure of certain facts. If a party wants a court to set aside an earlier order because of non-disclosure he or she is going to need some pretty compelling evidence. It will not be enough to re-hash the same arguments the party had put forward at the time of an earlier hearing. In all likelihood he or she will need some solid new evidence. A good example might be in a case where one side said they had no intention of selling a company, then not long after the hearing the company announces it is going to be sold and says it has been in talks with possible buyers for some time: *Sharland v Sharland* [2015] UKSC 60.

The court's approach to non-disclosure will depend upon whether the non-disclosure was innocent or fraudulent. If it is fraudulent there is a better chance of having the consent order set aside.

On the other hand if the non-disclosure was "innocent" the party will need to show that the non-disclosure was "material". In other words he or she will have to show that if the true position had been known the court would have made an order which was substantially different from the order which was made. So in other words, if the innocent non-disclosure would not have made a great deal of difference, it will not be a reason for setting aside the consent order.



A consent order can also be set aside by the court on account of fraud. If a consent order has been achieved by fraud on the part of one of the parties it will be easier to have it set aside. See *Sharland v Sharland* (above).

However, even if a party could show fraud, delay in bringing the matter back to court might prevent the court from setting aside the original order.

The court can also set aside a consent order upon production of evidence of duress or undue influence. If a party was “coerced” into agreeing to a consent order or if the other party exerted “undue influence” on them to get them to agree to the order, this could be a ground for setting aside.

Mistake, as the party herein alleges, also suffices a ground for setting aside a consent order. For instance, it might be a ground for setting aside a consent order that one of the assets was very significantly undervalued. Alternatively it might be that a debt was significantly underestimated. If the change in value happened after trial however, the court will be much less likely to set aside the order: see e.g. *Myerson v Myerson* [2009] EWCA Civ 282. It also makes it more difficult to set aside under this heading if the parties could have discovered the true position if they had been diligent enough at the time.

If something exceptional has happened after the consent order, it may also be set aside. This is known as a “Barder” application. It is named after the case of *Barder v Barder* [1988] AC 20. In that case a final order was made in relation to the parties’ finances. Five weeks later, the wife committed suicide. An appeal in relation to the original order was allowed.

Later cases have shown that for a party to successfully set aside consent orders on this basis the court will need to be satisfied:

- That the new events relied upon invalidated the fundamental assumption on which the order was made so that, if leave were given, the appeal would be certain or very likely to succeed
- The new event happens soon after the order. The suggestion in the case itself was that it would need to be within 1 year of the order;
- The person appealing does not delay in applying to set aside;
- No innocent parties are prejudiced; and,
- The change could not reasonably have been foreseen.

See *MAP vs RAP*, [2013] EWHC 4784, and *In CS v ACS* [2015] EWHC 1005

I considered the case authorities cited by counsel for the Claimant as well to the effect that an independent matter was required to set aside the consent order on this matter. It is true suffice it to say that, under inherent jurisdiction, the High Court, on application or on its own motion, is capable of setting aside or invalidating a consent order on the same matter on the basis of the factors stated above.

In the present case, the Defendant stated that the mistake lie on the fact that the goods carried by the tankers belonged to the 3<sup>rd</sup> party and not the Defendant herein, and therefore it would be wrong for the Defendant to make any pledge or undertaking by consent on the strength of the goods that belonged to the 3<sup>rd</sup> party. With due respect, the mistake on this matter has not yet been brought to light bearing in mind that the said 3<sup>rd</sup> party has not yet appeared before this court as disposes Order 29 of the CPR, 2017. Admittedly, it is not for the Defendant to allege that certain seized goods belonged to a 3<sup>rd</sup> party. The law is very clear and places the onus on the 3<sup>rd</sup> party to take out interpleader summons and claim his or her property. In the absence of the said 3<sup>rd</sup> party successfully interpleading, it cannot be concluded that the consent order was entered into by mistake.

However, I am aware that consent orders could also be overridden by subsequent orders on merit by the court. Interlocutory orders are always amenable to change upon final determination by the court. I heard both parties on the application herein, and surely, my subsequent orders should have effect on the same.

In making the present ruling, I also had time to consider the circumstances of the underlying matter. It is true the Defendant did not comply with the order of the court made on the 21<sup>st</sup> of May, 2021 to the extent that the Defendant should file their *interparte* application to set aside the default judgment within 7 days. They resurfaced after 6 months, instead. I have also noted that their initial application to set aside the default judgment which ended up being dismissed for non-attendance, was filed within time. I would therefore give them a benefit of doubt by allowing their application in part, but on the following conditions;

1. The defendants to file and serve their *interparte* application within 7 days from the order of this court.
2. The Defendant to collect the seized goods on full payment of Sheriff Fees and Expenses not later than 48 hours from today 4.30 PM.
3. That Howo Tanker Registration Number T518 DLV and Scania Tanker Registration Number T545 DJY are hereby attached to the Sheriff's levy,

and therefore their respective Blue Books should be surrendered to the Sheriff of Malawi before collection.

4. That the Defendant makes a deposit with the Sheriff of Malawi in sum of **MK10,000,000.00** in lieu of the fuel; being a nominal value of the said goods. The deposit should be made within 7 days from today, and should remain in the custody of the Sheriff of Malawi until the final determination of the matter.

These conditions are thus set up as pre-conditions for the hearing of the Defendant's *interparte* application to set aside the default judgment. The consent order dated 26<sup>th</sup> November, 2021 has been overridden by this ruling and its attendant orders, and is, therefore set aside.

Failure by the Defendant to comply with any of the above orders within the allotted time frame, their application to set aside the default judgment shall not be entertained, the order for stay of execution herein shall stand vacated, and the Claimant shall be at liberty to enforce the default judgment, accordingly.

Costs are for the Claimant.

Made in chambers today Friday, the 3<sup>rd</sup> of December, 2021.

**Brian Sambo**  
**Assistant Registrar.**

