



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI SITTING AT BLANTYRE
PRINCIPAL REGISTRY
CIVIL DIVISION
PERSONAL INJURY NUMBER 1254 OF 2021
(Before Honourable Justice Nriva)

BETWEEN

LOVEMORE KANTANDIRO-----**CLAIMANT**

AND

MALAWI HOUSING CORPORATION-----**DEFENDANT**

CORAM: HIS HONOUR E. BLACKBOARD DAZILIKWIZA PACHALO DANIELS

Mr. E. Mwandira, Counsel for the Claimant,

Mr. K. Bonzoe Soko, Counsel for the defendant,

Mr. F. Mathanda, Clerk/Official Interpreter,

RULING

1. He argued his case with great command, when at it, he demonstrated valour and skill. His arguments were piercing through the veins of the Court's judicial heart. I mean, he was passionate as he was eloquently competent in his forceful oral submissions. This, we mean Counsel for the defendant who was authoritative as he was intimately dissecting the law into rather more palatable pieces, pieces of which, the mind of the Court swallowed with great pride and satisfaction. The passion with which he argued, is something that the Court should spare a second to commend Counsel for his judicial munificence as an officer of the Court. His was an application for stay of the enforcement of a judgement debt on costs entered as against the defendant through a consent order dated 9th February, 2023. As it were, the sale and seizure order was obtained on 10th May, 2023. On his part, the learned Counsel Mwandira was on brief for Chidontho of Counsel, but one could hardly notice that he was, for his industry and craft was no different. He was of great and impeccable use to the Court. To some, this may be mere verbose and legalise, but much power does the Court have, and why

should it only use it when it is incumbent upon the Court to rebuke Counsel? Why should we not use the same valour to pay particular attention to Counsel's industry as an officer of the Court under section 32 of the Legal Education & Legal Practitioners Act, 2018? The language from the bench should be one that binds the profession and must only be fierce against its officers when and only when, it is so necessary. But the Court should take pride when it is properly informed by Counsel as a matter of duty.

If we have duty to impose discipline and professional conduct as against Counsel, we must also have in the like manner, a duty to commend Counsel when they properly so act. It is rather a mistake not to maintain a duty of courtesy even to Counsel. Since, Counsel hardly has perhaps a platform to express our shortcomings and fallibilities, we must be very economical with our words, they must be free from undertones of ridicule but full of grace and firm when they should. To those who think we are wrong to even spare a minute, their message is simple, you can think the law to be dry and lifeless, and even take issue with how we present it, but the law is living and sharper than a double-edged sword, and it has outlived those we call ancestors at law. To those who meditate on it, they have an understanding beyond the letter of the law to the spirit of the law. But, ours is a duty to the profession, to make sure we bequeath it undiluted to the next generation. Counsel's paramount duty, is the duty of competence. This, we conclude they both had when they addressed the Court.

Be that as it may, this Court will not undress all the forceful arguments Counsel made, rest the spirit of brevity be bruised unnecessarily and, in the end, keeping lady justice in wait when she should not be delayed till she is delivered. Thus, the defendant is enticing this Court to grant suspension order as against a sale and seizure order obtained against them on the premise that, according to them, they are a public institution which should be immune to the herein enforcement order under Order 34 Rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017. Hence, denying them a stay and to allow the execution to proceed would be to disturb the functions of a public institution made to serve the people of Malawi. This they imply, will be prejudicial.

2. As it were, I must articulate at the onset that by his hand, the honourable judge seized of this matter on 18th May, 2023, directed that this Court under Order 25 Rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017, should proceed to entertain this application. We heard the application on 8th June, 2023. We pronounced ourselves through email. This, we did in accordance with Order 1 Rule 5(5)(j) of the Courts (High Court) (Civil Procedure) Rules, 2017. What we are doing today, is to briefly communicate our reasonings in compliance with Order 23 of the Courts (High Court) (Civil Procedure) Rule, 2017.
3. Coming to the case for the claimants, now the respondent, the learned Counsel Mwandira has argued that the defendant is a body corporate she can be sued and sue, she can enter into contracts and all, and again that the fact that the government gives her advances, when need be, only indicates that she is an independent legal person at law and hence she should not pretend to be a department of the state and therefore immune to such enforcements as against her. Put, differently Counsel argues that the

defendant must not pretend that she is immune. In his arguments, Counsel Mwandira expressed worry as to how else then would judgements be enforced against the defendant. I must be quick to respectfully note that, this argument must not be sustained, because immunity under Order 34 of the Courts (High Court) (Civil Procedure) Rule, 2017 does not mean that there can be no enforcement. It does not mean so. Order 34 of the Courts (High Court) (Civil Procedure) Rules, 2017 must be understood to mean what it says in its clear meaning. That said, Counsel further argued that, the defendant is not an institution protected under Civil Suits Against Government and that she is not represented by the Attorney General and there she must not pretend that the protection on Order 34 of the Courts (High Court) (Civil Procedure) Rule, 2017 extends to her.

4. On this, Counsel Soko was quick to advise the Court in rebuttal that in fact the Attorney General has times and again represented the defendant just like the attorney general has invited the services of private Counsel. To this, Counsel submitted that just because the Attorney General, does not automatically represent the defendant, it does not take away the public status that the defendant enjoys by virtue of her nature and creation. This argument holds over the argument narrated by Counsel for the claimant. I must agree with the learned Counsel for the defendant on this point because there are cases where the Attorney General has represented the defendant in other cases in Court. So, I cannot sustain the argument that just because the Attorney General does not automatically represent the defendant then therefore, she should not be accorded the protection under Order 34 of the Courts (High Court) (Civil Procedure) Rules 2017.
5. Perhaps, that argument is easily rebutted because it presumes what evidently is not always the case. To check the government status of the Corporation, one has to be mature and simply check how the institution functions. I mean, she is created by statute and not under the Companies Act per se. That the Companies Act, 2013 is a statute is not in dispute. But we will not clarify ourselves on the milk of the law. Certainly not. But Counsel Soko was on point he without mercy terrorised the argument that the Attorney General does not represent the defendant therefore the defendant is not a public institution or government department. Well, all it needed to take to rebut that premise was simply one case.

Thus, he invited this Court to cross fertilize its mind with Justice Katsala JA in the case of Malawi Housing Corporation v Edwin Nyirenda Civil Appeal No. 26 of 2022 (Unreported). That we did. It is clear how that case exposes the functionalities of the defendant. In fact, it was the Honourable Office of the Attorney General that represented the Corporation. We therefore find it hard to sustain the argument made by the learned Counsel Mwandira. It is declined. In a similar manner, I must also decline his argument that just because an entity is not sued under Civil Procedure (Suits by or against the Government or Public Officers) Act, it is no conclusion that the department in issue is not a public institution within the meaning of Order 34 of the Courts (High Court) (Civil Procedure) Rules, 2017. I respectfully, take issue with that reasoning and for now, I will spare the obvious rudimentary discourse for another time. This is not the time.

6. Be that as I have enunciated myself, I had some occasion with the law and let me particularly bring to duty the relevant provisions that both Counsel relied on in Court. Thus, section 3(1) of the Malawi Housing Corporation Act which provides as follows must be invited to the occasion:

“There is hereby established in accordance with this Act a body to be called the Malawi Housing Corporation.”

7. We think, the above is exhibit A of a government or public institution. We will add more to this argument later. As it were, this Court has to agree with Counsel for the defendant that there is nothing ambiguous with this provision and that it is clear as it comes. There is no ambiguity whatsoever with this provision, and I need not to cite any authorities on rudimentary principles of statutory interpretation. The natural and ordinary meaning of the words of the statute are the first resort as a matter of principle. Thus, the defendant is a creature of statute different from other legal entities.
8. Moreover, to appreciate the exception argument, we should invite Order 34 Rule 4 of the Courts (High Court)(Civil Procedure) Rules 2017 which provides as follows:

“4.—(1) The following orders under Order 28 shall not apply to any order against the State—

- (a) A money order;*
- (b) A seizure and sale order;***
- (c) Third party debt order;*
- (d) Charging order; or*
- (e) An appointment of a receiver.*

*(2) In sub rule (1), “order against the State” means any judgment or order Against the State, a government department, **public institution** or public officer as such, made—*

- (a) In civil proceedings by or against the State;*
- (b) In proceedings in a tribunal;*
- (c) In connection with an arbitration to which the State is a party; or*
- (d) In other proceedings to which the State is a party.*

(Emphasis Added)

9. As it were, what comes clear on the reasoning of this rule is what Counsel Soko has submitted. I must respectfully enunciate that; I did not receive much analysis and or interrogation of this provision by Counsel for the claimants. His arguments largely focused on the fact that the Corporation is a separate body at law. Consequently, he reasoned that judgment debt must be enforced. Of course, that is agreeable indeed, in a Constitutional order, and indeed with the reasoning of section 41(3) of the Constitution of the Republic, every person is as a matter of right entitled to have an effective remedy and this Court holds the view that enforcement of a judgment forms part of effective

remedy entitlement under the Constitution. However, to respectfully insinuate as if Order 34 of the Courts (High Court) (Civil Procedure) Rules, 2017 one cannot realise the fruits of his litigation against the government is not accurate. One just needs to know how. We think it is not our duty owed to Counsel to advise how that happens. What we have been asked is whether Order 34 of the Courts (High Court) (Civil Procedure) Rules, 2017 extends her hand to be of aid to the defendant. At this level, we think we are convinced that it does.

10. But what if our conviction is found wanting? But again, Counsel Soko was correct to guide even his learned colleague that it is not to dispute that the defendant legal personality of the defendant, but that as per definition within Order 34 Rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017 the defendant is a public institution and that it should be immune to orders which may partly be obtained from Order 28 of the Courts (High Court) (Civil Procedure) Rules 2017. I must be quick to mention that I listened keenly and I did not hear any counter arguments from Counsel Mwandira on the issue of whether the defendant herein is a public institution within the meaning of Order 34 Rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017. On this he offered no aid to the Court. He only spoke in the reverse that in his view she, I mean the defendant, should not pretend to be anything other than a legal person at law. Perhaps, I must state that I had the opportunity to read Black's law's dictionary, 2nd Edition, over the meaning of public institution which is provided as follows:

*"The name that is applied to a school, college, courthouse, library, hospital and other place that **is run for the public to use**. The opposite of a private institution."*

(Emphasis Added)

11. Again, what the above shows in its clear terms is that, the fact that the defendant is there for the public to access her services is beyond question. As it were, this is the more reason she is created to service the public. There is statutory support to this our view. Thus, of particular importance is section 3(3) of the Malawi Housing Act must be called to duty, the provision provides as follows:

*"Subject to the provisions of this Act, the corporation shall have the function of continuously providing housing accommodation and reviewing housing needs **of the people of Malawi...**"*

(Emphasis Added)

12. It is clear from the above, that clearly, the Corporation is a government entity separate though as it is, but the purpose with which it was created on, only points to its public nature as an institution created under statute. Therefore, with think it is okay to conclude that the defendant is a public institution within the meaning of Order 34 Rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017. Conclusively, let me agree with Counsel Soko on this point. Consequently, the defendant ought to be protected from the grip of Order 28 of the Courts (High Court) (Civil Procedure) Rules, 2017 to an

extent as is indicated on Order 34 Rule 4 of the Courts (High Court) (Civil Procedure) Rules, 2017.

13. What then? This was an argument which was condition precedent to the application made by Counsel. His is an application for stay. As it were the law relating to the issue of granting and denying stay is predicated on the question of whether granting a stay would be prejudicial or risk an injustice on either party. The Court in Gerald Kazembe v Electoral Commission & Another Election Petition No. 8 of 2019 (Unreported), cited with earnest reverence the reasoning of the Supreme Court of Appeal's decision of Mike Appel and Gatto v Saulos Chilima MSCA Civil Appeal No. 20 of 2013 (Unreported) as follows:

*“Last but not least, is the argument for the Respondent that the principles for granting suspension of execution do not support suspension of this application. To support this argument, the learned Counsel has argued that the Petitioner has failed to demonstrate that there are good and exceptional circumstances to warrant the grant of a suspension order or that there is a good reason to depart from established principles of law. However, the law as I understand it now, is that, **the principle is whether denying or granting suspension would occasion an injustice or would risk some prejudice to either party.**”*

(Emphasis Added)

14. It is clear from the analysis above that my finding in the above as to the status of the defendant, it would be so prejudicial and dangerous if this court was to decline the stay. The way the government operates for public service and to thwart the public access to public functions, is the very situation that Order 34 of the Courts (High Court) (Civil Procedure) Rules, 2017 seeks to protect.
15. With the foregoing, we worry the sale and seizure order was issued in the first place. But that is neither here nor there. We simply take cognizance of the fact that justice demands that the order of enforcement be suspended. As it were, this does not run counter to the principle that a successful litigant must not be denied the fruits of his litigation. We have not denied him on that. We simply have denied how he should reap the fruits of his litigation from the defendant. But he must still reap. How we do not know and it is not for us to pronounce ourselves Counsel for the claimant is competent to dive deep in the allowable practices of enforcements as against public institutions. That is his duty. Accordingly, the sale and seizure order obtained be and is hereby suspended.
16. Costs are in the discretion of the Court and the view of this Court is that each party should cover for their own costs. We have since been ably advised by the parties that they have since resolved their issues, thus we make no further order on directions.
17. I so order.

MADE in chambers this 16th June, 2023 at the High Court of Malawi, sitting at Blantyre, Principal Registry, Civil Division.



Elijah Blackboard Dazilikwiza Pachalo Daniels

ASSISTANT REGISTRAR