



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
PERSONAL INJURY CAUSE NUMBER 148 of 2020
(BEFORE JUSTICE MVULA)**

FESTON CHAUMA.....ENFORCEMENT CREDITOR

-AND-

BERECHMAS CHINEMA.....ENFORCEMENT DEBTOR

-AND-

ATTORNEY GENERAL.....1ST THIRD PARTY

-AND-

AMIKOLA ELECTRICAL ENGINEERING SERVICES.....2ND THIRD PARTY

CORAM: HELLEN CHITSANZO KACHALA, ASSISTANT REGISTRAR

Dr Zolomphi Nkowani- Counsel for the Second Third Party

Mr. Juma- Counsel for the Enforcement Creditor

Mrs. C. Dhlamini - Official Interpreter

RULING

INTRODUCTION

1. This is an application by Amikola Electrical Engineering Services to set aside the Final Third Party Debt Order that was issued against the Attorney General on 8th October, 2021.
2. The Enforcement Creditor opposes the application.
3. The applicant made a without notice application but I directed that it come with notice. The parties were heard, hence this application.

PARTIES SUBMISSIONS

4. Both Counsel made oral submissions to the court. Only Counsel for the Enforcement Creditor filed written submissions with the court. I followed up with counsel on 13th November, 2023 for the Enforcement Debtor on their written submission as I could not see any court record. On 16th November, 2023 Counsel indicated that he would file the written submissions but he did not. Nevertheless, I proceeded to make the ruling herein.
5. In his sworn statement, Counsel for the Applicant has submitted that the claimant is a partnership comprising Mr. James Patrick Chiona and the Enforcement Debtor. He has exhibited a copy of the Partnership Deed.
6. He states that the Enforcement Creditor deliberately misrepresents a material fact at paragraph 7 of Counsel's sworn statement. The said paragraph states that the claimant is a sole trader, misleading the court to grant it the interim order sought. He argues that this deliberate misrepresentation and suppression of a material fact is fatal and incorrect.
7. He states that the Enforcement Creditor has obtained a Third- Party debt order against the Attorney General attaching the sum of MK17, 825, 000. 00 payable to the claimant who has not been joined but directly affected by the said order.
8. He states that the debt in issue is in relation to a personal debt of the Enforcement Debtor and nothing to do with the partnership, that denies owing the Enforcement Debtor any money for which the interim third-party order has been issued.
9. He argues that even if the claimant were to owe the Enforcement debtor specific debt, will have to be specifically proved and particulars given and not as has been done in the present case, making the order irregular and unenforceable. That the attachment of the sum of MK17, 825, 000. 00 has to be proved as due and owing from the claimant to the Enforcement Debtor which has not been done.
10. He states that the statement of Berechmas Chinema and the exhibits show that the 2nd

Third Party is not indebted to him as pleaded or any at all.

11. On the other hand, Counsel for the Enforcement Creditor has submitted arguments in opposition. In the sworn statement of Feston Chauma he states that after an Interim Third Party Debt Order was issued, it was duly served on the Enforcement Debtor and the Third Party.
12. He states that the Enforcement Debtor, the Third Party or any representative of Amikola Electrical Engineering Services did not file and serve any sworn statement in opposition to the application for a Final Third Party Debt Order. Further, the application of Final Third Party Debt Order the Enforcement Debtor, the Third Party and representatives Amikola Electrical Engineering Services did not attend Court.
13. He further states that the Court issued a Final Third Party Debt Order on 18th October, 2021 against the Attorney General.
14. He also states that in terms of the Final Third Party Debt Order, it was ordered that the Attorney General had to pay out to him the sum of MK17, 825, 000. 00 from the debt it owed Amikola Electrical Engineering Services by reason of the Agreed Order issued on 8th December, 2021 in the case of **Amikola Electrical Engineering Services vs. Attorney General (Ministry of Natural Resources Energy and Mining)** Commercial Case No. 187 of 2021.
15. He explained that the transaction subject to the action was not the first he engaged with the enforcement debtor.
16. He stated that prior to the transaction he had lent money to the enforcement debtor in about five times. That all those loan transactions the loan agreements were made with the Enforcement Debtor through cheques issued by Amikola Electrical Engineering Services.
17. He went on to explain that in all the times the Enforcement Debtor used to represent that the firm (Amikola Electrical Services) belongs to him and was getting the loans for purposes of the business activities of Amikola Electrical Services is partnership for the first time in the present proceedings.
18. He stated that the enforcement debtor obtained the loan herein for the purposes of the work Amikola Engineering Services had under Malawi Rural Electricity Programme (MAREP) under a contract with the Government of Malawi.

19. He explained that his investigations revealed that the partnership herein was dissolved way back and the enforcement debtor is proceeding with the business of Amikola Engineering Services alone. Consequently, all the money therein belongs to him.
20. He stated that after the issuance of the Final Third Party Debt Order herein he talked to the enforcement Debtor and he told him that when the Attorney General paid out all the money to Messrs Zolomphi & Co it owed him/or Amikola Electrical Engineering Services he directed his lawyers to pay out the money subject to the Final Third Party Debt Order herein to him in settlement of the judgment debt herein.
21. He explained that consequently the sum of MK17, 825, 000. 00 herein was left and is still in the custody of Messrs Zolomphi & Company for remittance to him in settlement of the judgment debt herein.
22. He stated that when he noted that despite Messrs Zolomphi & Company were not remitting the money to him he applied for an order of payment wherein he sought an order that Messrs Zolomphi & Company should pay out to him the sum of MK17, 825, 000. 00.
23. He went on to state that despite being served with the application, Messrs Zolomphi & Company should pay out to him the said sum, they neither filed a sworn statement in opposition nor attend court on the date set for hearing of the application.
24. He also explained that the court after hearing him through his legal practitioners on the application made an order of payment wherein Messrs Zolomphi & Company were ordered to pay the said sum of MK17, 825, 000. 00 which they held on behalf of the enforcement debtor to him.
25. He stated that to date Messrs Zolomphi & Company have not complied with the order and continue to keep the money contrary to the directions of the enforcement debtor and within order of the court.
26. Counsel for the Enforcement Creditor has referred the court to Order 28 rule 17 of the Courts (High court) (Civil Procedure) Rules 2017(CPR) which provides as follows:
 - (1) Where the enforcement debtor or the third party objects to the Court making a final third party debt order, he shall file and serve written evidence stating the grounds for his objections.
 - (2) Where the enforcement debtor or the third party knows or believes that a

person other than the enforcement debtor has a claim to the money specified in the interim order, he shall file and serve written evidence stating his knowledge of that matter.

- (3) Where the third party has given notice under rule 15 (4) that he does not owe any money to the enforcement debtor, or that the amount which he owes is less than the amount specified in the interim order and the enforcement creditor wishes to dispute such assertion, the enforcement creditor shall file and serve written evidence setting out the grounds on which he disputes the third party's case.
- (4) Written evidence under sub rules (1), (2) or (3) shall be filed and served on each party, as soon as possible, and in any event not less than 3 days before the hearing.
- (5) Where the Court is notified that a person other than the enforcement debtor may have a claim to the money specified in the interim order, the Court will serve on that person notice of the application and the hearing.
- (6) At the hearing the Court may_
 - (a) make a final third party debt order;
 - (b) discharge the interim third party debt order and dismiss the application;
 - (c) decide any issues in dispute between the parties, or between any of the parties and any other person who has a claim to the money specified in the interim order; or
 - (d) direct a trial of any such issues, and if necessary give directions.

27. Counsel for the enforcement creditor has submitted that the cited Order apply where a Final Third-Party Debt Order has not been made. That it provides an Enforcement Debtor, third parties and any person other than the enforcement debtor who may have a claim on the money subject to an interim Third-Party Debt Order by filing written evidence before the court and serving it on the Judgment Creditor.

28. He has also submitted that where that happens, it is expected that the concerned party would attend the hearing of the application for Final Third-Party Debt Order.

29. He argues that Order 28 rule 17 of the CPR does not deal with issues after a Final Third Party Debt Order is issued. That the rule does not provide for application to set aside Final Third Party Debt Order.
30. Counsel Chidothe has further argued that the he has read through the rules relating to Third Party proceedings under the CPR but none provide for applications to set aside Final Third Party Debt Order by any party.
31. He argues that the application is misconceived because it lacks legal basis. Therefore, it should be struck out.
32. He argues that the court has power to strike out an application for being an abuse of the process of the court. He has referred the court to the case of **Lucia Mategula Chola vs. Dr.Nga Mtafu** Civil Cause Number 2382 of 2006 where the court stated that:
- "This term "an abuse of the process of court" connotes that the process of the court must be bonafide and properly an must not be abused. The court will prevent the improper use of its machinery, and will, in proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation."*
33. Counsel Chidothe submits that the applicant herein has not acted in a reasonable manner which in his view demonstrates that the application is frivolous, vexatious and abuse of the court.

ISSUE FOR DETERMINATION

34. The sole question for the court's determination is whether or not the Final Third Party Debt Order herein should be set aside.

LAW AND ANALYSIS

35. The reason that Counsel for the Enforcement is advancing for the application to set aside the order herein is that it attaches debt to a partnership. He states that the Enforcement Creditor deliberately misrepresents a material; that the claimant is a sole trader, misleading the court to grant it the interim order sought. He argues that this deliberate misrepresentation and suppression of a material fact is fatal and incorrect.
36. On the other hand, the claimant argues that the alleged Partnership herein was dissolved way back. That the enforcement debtor has been continuing with the business herein a sole proprietor. The evidence in the Enforcement Creditor's sworn statement shows that

the Enforcement Debtor contracted the debt subject to the action herein for purposes of the business of Amikola Electrical Engineering Services. Again, that the Enforcement Debtor borrowed money from the Enforcement Creditor on several occasions for purposes of Amikola Electrical Services. This is evidence that the Enforcement Debtor has been the sole owner of this firm. He argues that this fact is also confirmed by the fact that the Attorney General and the Third Party did not object to the Final Third party Debt Order issued by the court.

37. Counsel for the claimant also argues that the position at law is that a Partnership has no legal personality. Consequently, there is no separation between the business and its owners.
38. It is not in dispute that the Enforcement Debtor owes the Enforcement creditor the sum herein. It could be true that claimant is not a sole trader; that Amikola Electrical Engineering Services is a Partnership.
39. I have referred to section 26 of the Partnership Act. It provides as follows:

The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules—

(a) all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;

(b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(i) in the ordinary and proper conduct of the business of the firm; or

(ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(c) a partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per centum per annum from the date of the payment or advance;

(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;

MADE IN CHAMBERS ON THE 29TH JANUARY, 2024

A handwritten signature in black ink, consisting of a large, stylized capital 'H' followed by a cursive 'K' and 'A'.

HELLEN CHITSANZO KACHALA

ASSISTANT REGISTRAR