

Ungolo J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 541 OF 1993

BETWEEN:

JACKSONS SUPPLIES.....PLAINTIFF

- and -

THE HETHERWICK PRESS LIMITED.....DEFENDANT

CORAM: D F MWAUNGULU, REGISTRAR

For the Plaintiff/Applicant, Mpando

For the Defendant/Respondent, Chiligo

O R D E R

This is an application by Jackson Supplies, a judgment creditor, to set aside my order of the 22nd October 1993, in which I stayed a warrant of execution by *fieri facias*. That order was granted *ex parte*. On 12th November 1993, I refused to set aside the order. I reserved reasons.

This action was commenced on the 4th of May 1993. The judgment creditor sued for the price of goods sold and delivered to the judgment debtor. There was a notice of intention to defend lodged with the Court on 4th June 1993. On the 30th of June 1993, the judgment debtor agreed for summary judgment to be entered against him. There was no application for stay of execution on the date of the order.

The judgment debtor, on the 1st of July 1993, obtained an order *ex parte* staying execution pending an order by a Judge to pay the debt by instalments. The judgment debtor applied and was granted the order on the 30th of July 1993. The judgment debtor was ordered to pay K4,000.00 per month with effect from 1st September 1993. This was to continue for four months when either the judgment debtor or creditor could vary the order.

The judgment debtor defaulted payment in September; the Sheriff went to his premises. He locked the offices of the judgment debtor. The judgment debtor rushed to the Court to obtain another order staying execution pending the judgment debtor making arrangements to pay the debt by instalments. I granted the order *ex parte* on almost the same terms as the Judge. The judgment creditor, upon being served with the *ex parte* order, applies to have it set aside.

The first point taken for the judgment creditor is that since the judgment creditor had already been granted an order to pay by instalments, the judgment debtor's **ex parte** application for stay of execution should not have been granted. On close reading of the rule under which the application is made, the submission cannot be entertained:

"1-(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution -

- (a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or
- (b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the Court may by order stay execution of the judgment or order by writ of **fieri facias** either absolutely or for such period and subject to such conditions as the Court thinks fit." (O.47, r.1)

The rule must be understood to mean that the Court can stay execution on a "judgment or order". The word "order" includes an order for payment by instalment. In this case, therefore, the Court could stay execution even after there was an order for payment by instalments, as long as the Court deems it inexpedient to enforce the judgment or order or the applicant is unable from any cause to pay the money. In the affidavit in support of the application to stay execution, the judgment creditor depones that he had no funds in September and the General Manager, sick at the time, could not authorise payment. Plausible reasons indeed. He has in fact paid the K4,000.00 into Court in compliance with the order. The Court can, therefore, stay execution even after there is an order to pay by instalments.

I have already demonstrated that from the affidavit in support of the application to stay execution there were grounds for staying execution. This takes care of ground two of the judgment debtor's contention.

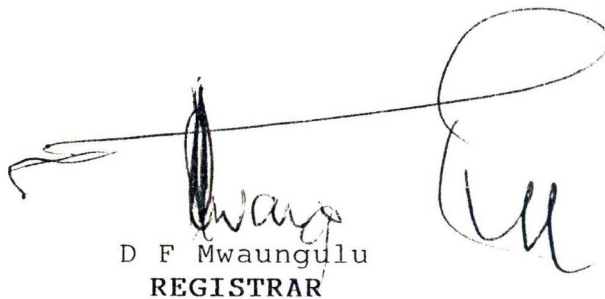
It is contended, for the judgment creditor, that certain aspects of the order that I made were not prayed for by the judgment creditor. I ordered that execution be stayed on condition that sheriff fees are paid, the debtor pays K4,000.00 a month, with effect from 31st October 1993. I also ordered that the application to pay by instalments be

made to a Judge within 14 days of the order. Admittedly, the judgment debtor applied for stay of execution pending the hearing of an application to pay the debt by instalments. The other aspects of the order can competently be made on such an order. On an application to stay execution, according to Order 47, rule 1, of the Rules of the Supreme Court, the Court can stay execution either absolutely or for such period and subject to such conditions as the Court thinks fit. As a matter of practice, where the stay is for purposes of enabling the judgment debtor to apply under section 11 c (x) of the Courts Act, to pay by instalments, I have attached payment of the amounts the judgment debtor will request the Judge till the order of the Judge. This is because, given that it takes long to hear such applications, and it would be unfair to the judgment creditor not to have any payment in the interim, it is only reasonable that the stay should be on condition that the judgment debtor pays the debt by instalments. Even in the United Kingdom the practice is the same.

Then it is said, on behalf of the judgment creditor, that I could not attach such condition - payment by instalments - because the power derives from statute. Mr Mpando relied on the case of **General Tinsmiths -v- The Munch Hut and Fast Foods Ltd, Cw 293/93** (unreported). I think that it is important to make a distinction between this case and the one cited by Counsel. That case turned out on the application under section 11 c (x) of the Courts Act. The Registrar cannot hear an application to pay by instalments. Where, however, like here, the application is to stay execution by writ of **fieri facias**, a Registrar has jurisdiction. He can attach conditions, including payment by instalments. In the United Kingdom, the Master or Registrar has such power independent of a statute. I have the same power, therefore.

All in all, therefore, I find no reason to set aside the order I granted **ex parte**. The warrant of execution will continue to be stayed until there is an order to pay by instalments or variation of the order of the Judge.

MADE in Chambers this 12th day of November 1993, at Blantyre.


D F Mwaungulu
REGISTRAR