

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1165 OF 1993

BETWEEN:

THE TRUSTEES OF SEDOM PLAINTIFF

and

S B CHITSONGA 1ST DEFENDANT

and

NIXON B MISASA 2ND DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Nyirenda, Counsel for the Plaintiff
Kaliwo, Counsel for the Defendant

ORDER

On the 30th November, 1993, after hearing an application by the defendant for stay of execution, apparently made under Order 13, rule 8, I ordered that unless the defendant lodges with the court and serves the judgment creditor with a full and frank disclosure of assets as required under Order 47, rule 1, within seven days of the order, the application to stay execution will be dismissed without further order. The defendant was relying on the new Order 13, Rule 8, of the Rules of the Supreme Court.

This Order did not exist until 1979. After it was introduced, it was logically lauded by the authors of the Supreme Court Practice because of the benefits it conferred on courts, plaintiffs and defendants. For Courts, introduction of the rule meant that defendants would be more truthful instead of introducing shadowy defences. To avoid execution against their goods defendants could now directly admit liability and ask the court to stay execution upon their goods on such terms as the court thinks fit, normally on them paying the judgment debt by instalments. For plaintiffs, they are spared the trouble of having to apply for summary judgment under Order 14. Courts benefit because there is direct reduction in the business. The defendant here wanted to take advantage of this rule.

There are however, two aspects of the rule which the defendant has not complied with to enable the operation of the rule. First it is very very important that the application should be made within the time stipulated. If the defendant lodges with the court an acknowledgment of service containing a statement that he does not intend to contest the proceedings and he intends to comply for a stay of execution of the judgment by writ of fieri facias, the judgment is stayed automatically in the first 14 days. The rule requires that within 14 days, the defendant must issue a summons for such a stay, which summons must be supported by an affidavit in accordance with Order 47, rule 1. If the summons is not made within the 14 days, the stay of execution does not continue.

It is the contention of Mr. Nyirenda appearing for the plaintiff, that in so far as the defendant did not issue the summons within the 14 days, the rule has no effect. He is right. However, I should mention that the rule is subject to the other right of the defendant to apply for extension of time. Unfortunately in this case, there was no such extension. The situation remains, therefore, that the rule would not apply.

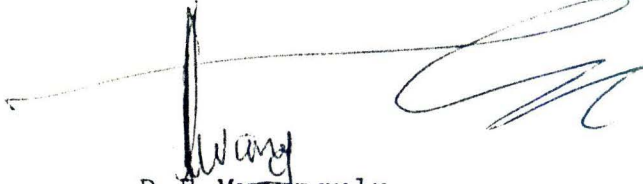
There is a second aspect. Even if the application was made within the 14 days required, the defendant did not comply with the requirement in the rule that the application must be supported by an affidavit in accordance with Order 47, rule 1 of the Rules of the Supreme Court. The defendant did not file an affidavit as is required under Order 47, rule 1(3). The statutory power for stay of execution is section 15 of the Sheriff Act which has the same requirements as Order 47, Rule 1(3). The defendant, therefore, did not comply fully with Order 13, rule 8.

There are, therefore, two aspects of the requirements to Order 13, rule 8 which the plaintiff did not comply with.

Mr. Nyirenda contends that the application should therefore, be dismissed. Mr. Kaliwo appearing for the defendant applied for extension of time in which to file such an affidavit. If the defendant does not comply with the stipulations of time under Order 13, rule 8, he can still apply, independent of the rule, for stay of execution under Order 47, rule 1. Obviously if the defendant had complied with Order 47, rule 1(3), I would have ordered stay, independent of Order 13, rule 8. The matter, however, must be looked at in its totality with the view to do justice to both parties and saving costs. This does not mean that the rules of Court should be

broken any time by litigants. The better approach is to state that the situation here is an irregularity and proceed under Order 2, rule 1. That is why on the 30th November, 1993, I made the unless order just mentioned.

Made in Chambers this 10th day of December, 1993.



D F Mwaungulu
REGISTRAR OF THE HIGH COURT