IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2184 OF 1994

M CHIU AND COMPANY LTD .....PLAINTIFF

and

KHRISHNA STORES LTD.....DEFENDANT

CORAM: R R Mzikamanda, Deputy Registrar
Mr Nampota for the Plaintiff
Mr Chiligo for the Defendant

RULING

On 13th February, 1995 Mr Chiligo acting for the defendants took out summons for security for costs on the ground that the plaintiff is ordinarily resident out of the jurisdiction. The application is made pursuant to Order 23 Rule 1 Subrule 1 of the Rules of the Supreme Court. Mr Nampota who appears for the plaintiffs opposes the application.

In his submission Mr Chiligo stated that the application is grounded on the fact that the plaintiff is ordinarily resident outside the jurisdiction of this court. Further the address of the plaintiff was not stated in the writ of summons. It is essential that a foreign plaintiff must state his address in the writ of summons. Mr Chiligo further submitted that the rationale for seeking security for costs is that in the event that the defendant is successful the sum ordered for security for costs will cover the defendant's costs for the action. In the instant case the plaintiff has no assets within this jurisdiction and in the event that the defendant successfully defends this action he may not be able to recover costs by way of execution or otherwise. He estimates costs at the current rate of K168 per hour to fall within the brackets of K45,000 and K60,000.

In his further submission he contended that the right to security for costs is not waived by service of defence and the application may be made before service of defence. He further contends that although there is a default judgment and warrant of execution in this matter there should be an order for security for costs. He contends that the statement of claim was irregular since it was served out of time before leave was obtained from court to serve out of time. The defendant is applying to have judgment set aside on the ground of irregularity. Even is the judgment were regular it is not final judgment and the defendant is entitled to set aside. The fact that there is an unsatisfied judgment on the file should not

influence the court. The court is not called upon to decide on the merits or demerits of the case at this stage. The court should rely on Practice Note 23/1-3/3 in determining the application.

Mr Nampota strongly opposed the application, saying that this is not a matter where security for costs should be ordered. The award of security for costs depends on the circumstances of a particular case and the matter is in the discretion of the court. He opposed the application on the ground that there is an unsatisfied judgment in this matter. The plaintiff is already successful in this action and ordinarily no order for costs would be made in those circumstances. One of the factors considered in ordering security for costs is the likelihood of the defendant succeeding in the action. In this case there is no defence yet to the plaintiff's statement of claim and there is no indication that the plaintiff is unlikely to succeed. The prospects of the plaintiff succeeding are very high. Mr Nampota argues that the right course to take is for the defendant to file an application to set aside judgment which application should satisfy the test of disclosing a defence on the merits. Only after the judgment is set aside would an application for order for security for costs be made. He prayed that the summons be dimissed on the ground that there is an unsatisfied judgment on the file and that the plaintiffs prospects of success are very bright.

In his further submission Mr Nampota said that even if the court were to order for security the figure given by the defendant is inflated. The hours that the Mr Chiligo suggested that would be the basis of his estimated were exaggerated. In his view a figure in the brackets of K6,000 and K12,000 will secure the defendant.

Order 23 rule 1 of the Rules of the Supreme Court provides that if it appears to the Court:

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a norminal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation.

then if having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just. However, the court shall not require security for costs if the plaintiff's failure to state his address or mis-statement thereof was made innocently or without intention to deceive.

Both parties in the present case recognise that it is in the discretion of the Court to order security for costs. In exercise of such discretion the court is bound to consider the circumstances of each case to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. It is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In Sir Lindsay Parkinson & Co Ltd v Triplan Ltd (1973) Q.B 609 Lord Denning M.R. gave some circumstances the Court might take into account whether to order security for costs. These are whether the plaintiffs claim is bona fide and not a sham and whether the plaintiff has a resonably good prospect of success, whether there is an admission by the defendants on the pleadings or elsewhere that money is due, whether there is substantial payment into court, whether the application for security was being used oppressively so as to stifle a genuine claim and others. A major matter for consideration however is the likelihood of the plaintiff succeeding but such an application is not the occasion for a detailed examination of the merits of the case. Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated that there is a high degree of probability of success or failure. (See Porzelack KG v Porzelack (UK) Ltd (1987) 1 ALL E.R 1074). If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security (see Crozat v Brogden (1894) 2 Q.B 30 at 33).

As Mr Chiligo rightly observed the right to security is not waived by service of the defence, and an order for security may be made at any stage of the proceedings (See Martano v Mann (1880) 14Ch.D. 419.C.A; Lydney, etc Iron Ore Co v Bird (1883) 23 Ch.D 358). It follows therefore that an application for security may be made after judgment for the costs of further proceedings directed by the judgment. Delay in making the application is not a decisive factor, although it may be treated as important especially where it has led or may have led the plaintiff to act to his detriment, or may cause him hardship in the future conduct of the action.

I have deliberately set out the appliable rules in extensio in order that the issues be put into perspective. The history of this matter is curious. By a generally endorsed writ signed on 22nd November, 1994 the plaintiff instituted the present proceedings against the defendant. Service of writ was done by posting the writ to the defendant in the usual manner by ordinary post as evidenced by Mr Nampota's affidavit of 5th

December, 1994. On 2nd December, 1994 the defendants legal practitioners filed an acknowledgment of service and indicating an intention to contest the proceedings. On 10th January, 1995 the plaintiffs legal practitioners served a statement claim on the defendant's legal practitioners. The defendants did not serve a defence. Instead on 13th February, 1995 they took out the present summons to be heard on 8th March 1995. On 20th February 1995, seven days after the present summons were taken out, the plaintiffs signed a default judgment and also warrant of execution. In accordance with the rules security for costs can be ordered at any stage of the proceedings and in the exercise of its discretion in the matter the court must consider all the circumstance of the case. I have considered the fact that no defence has been served although there is an intention to defend. In these circumstances it is not easy to say whether the plaintiff is likely to succeed in the action. I note that there is a default judgment on file. This cannot be said to be a final judgment for the defendant is entitled to have it set aside if he can show a defence on the merits or a triable issue or indeed if he can show that it is an irregular judgment. Therefore the fact that there is on the file an unsatisfied default judgment is not sufficient to stop the granting of an order for security of costs. One cannot rely on this judgment to argue that ones prospects of success as a plaintiff are high. It is vital to note that the summons for security for costs was signed before the judgment and after an intention to defend had been indicated. Nowhere have I observed any admission of liability whether in part or in full, on the part of the defendant. The plaintiffs address in a foreign country is not disclosed on the writ or any other process before this court. Apparently the defendants discovered that the plaintiffs were a foreign country through their own inquiries which inquiries further showed that the plaintiffs do not have assets within this jurisdiction. I am of the view that this is a proper case where I must order security for costs. There is a warrant of execution which if allowed to be executed would result in executed property being dealt with in a manner which would present extreme difficulty for the defendants to recover should it turn out that they successfully defend the action.

There was the question of the amount of security for costs to be ordered. The parties recognise that this too is in the discretion of the Court, which will fix such a sum as it thinks just, having regard to all the circumstances of the case. It is not always the practice to order security on full indemnity basis. If security is sought at an early stage like in the present case an estimate of future costs would assist the Court. A skeleton bill of costs usually affords a ready guide. In this Court the defence has canvassed some figures while the plaintiff has also canvassed another set of figures. The sum claimed in this action is K698,158.94. Having given the matter careful consideration I am of the view that the appropriate amount of security for costs to be awarded is K45,000. I order security in that amount to be paid into Court within 30 days from todays's date. Costs in any event are awarded to the plaintiff.

MADE in Chambers this 7th day of April, 1995 at Blantyre.

R R Mzikamanda
DEPUTY REGISTRAR