



IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 7 OF 1986

(Being Civil Cause No. 915 of 1980)

BETWEEN:

PRESS (HOLDINGS) LIMITED .....

APPELLANT

- and -

R.P. CHISALA .....

RESPONDENT

Before: The Honourable the Chief Justice, Mr. Justice Makuta  
The Honourable Mr. Justice Unyolo, J.A.  
The Honourable Mr. Justice Mbalame, J.A.

Savjani, Counsel for the Appellant  
Chatsika, Counsel for the Respondent  
Maore/Manda, Court Reporters  
Kadyakale, Law Clerk

---

JUDGMENT

Makuta, C.J.

This is an appeal from the ruling of Mr. Justice Banda which ordered the respondent to pay his debt to the appellant by instalment. The proceedings started by an application by the appellant as judgment creditor under section 33 of the Sheriff's Act praying that the judgment debtor's property, which was fully described in the appellant's affidavit, be sold in order to satisfy the debt still owing.

Briefly the facts are that the Registrar of the High Court signed an order for judgment on admission on 5th March, 1981, in favour of the appellant for the sum of K19,200.00 and costs of the action. The respondent failed to satisfy the debt and a writ of fieri facias dated 11th March, 1981, was issued against his movable property. It turned out that the respondent had no assets worth seizing. Upon conducting search in the Land Registry at the Office of the Controller of Lands, Valuation and Water it was learnt that the respondent is lessee of premises at Plot No. BL/240 situated at Nyambadwe in the City of Blantyre and valued at K40,000.00. It was also learnt that the respondent had a disposing power capable of an uncontrolled exercise in his own favour in respect of the said property. An application by the appellant's legal practitioners under section 26 of the Sheriff's Act was therefore made to the High Court. The Registrar of the High Court duly authenticated the affidavit made under that application. The effect of the authentication was that it was lawful for the appellant to register the affidavit in the Deeds Registry and it then operated to vest in the appellant all the respondent's estate and interest in the land specified in that affidavit, subject to all such equities as may belong to other persons and subject to the respondent's equity of redemption.





There is no evidence to show that the property was encumbered at the time of the registration.

The grounds of appeal are:

- (i) The Learned Judge erred in law in failing to make an order for the sale of the defendant's land upon the hearing under section 34 of the Sheriff's Act of the plaintiff's application made under section 33 of the Sheriff's Act;
- (ii) The Learned Judge erred in law in considering the defendant's application to pay the debt in instalments when the only powers of the High Court under section 34 of the Sheriff's Act are to direct all such "inquiries to be made as to the nature of the debtor's interest and title (or otherwise) as shall appear proper";
- (iii) The Learned Judge erred in law in exercising a discretion where there is no discretion provided for in section 34 of the Sheriff's Act;
- (iv) Alternatively, even if the Learned Judge had a discretion, such discretion was exercised on wrong principles and, further, wrongfully exercised as there was no formal application for stay by the defendant with supporting evidence;
- (v) The Learned Judge erred in considering the defendant's application for stay (if it is held that a verbal application through Counsel suffices) as such application, if it can be made at all, can be made only under section 35 of the Sheriff's Act after an order for sale is made; and even under section 35 the discretion to grant a stay is limited to circumstances in which the debtor is insolvent and there are other creditors who have proposed a scheme of arrangement;
- (vi) The learned Judge erred in finding that the debtor had shown special circumstances.
- (vii) The Learned Judge erred in finding that the remedy available in Part IV of the Sheriff's Act is an extreme one and it should be resorted to in every exceptional cases.

When arguing the appeal Mr. Savjani, representing the appellant, dealt with the first three grounds together. We intend to do the same since these grounds are very closely related. It was Mr. Savjani's submission that since there was no formal application to stay the sale, the verbal application made by respondent's counsel to stay the sale and to pay the debt by instalments was highly irregular. Examination of section 33 of the Sheriff's Act reveals that the application for sale shall be made by summons. Section 34 provides that on hearing of the summons the High Court



may direct all such inquiries as to the nature of the debtor's interest and title as shall appear proper, such sale shall be carried out in all respects in accordance with the directions of the High Court. It is observed that the only discretion that the Court may exercise under such application is when it may direct an inquiry as to the nature of the debtor's interest and title. This is clear in the use of the word 'may'. If no direction for inquiry is made the Court should proceed to make an order for sale. There does not, therefore, appear to be any discretion to refuse sale. Should, however, an inquiry be conducted and it is discovered that third parties have claims over the property the Court, in considering the application, shall be obliged to take such claims into account.

We do not understand on what principles, in the circumstances of this case, the payment by instalments was made. We indeed agree with Mr. Savjani that there should have been a formal application with supporting evidence. Mere verbal application by Counsel without supporting evidence is not, in our view, sufficient. This also disposes of ground (iv).

We now turn to ground (v). After an order for sale has been made section 35 provides that any person claiming to be interested in any lands for sale of which an order has been made may apply to the High Court to stay the sale and the High Court may, after hearing all the necessary parties, give such directions and make such order as to High Court shall appear proper and just. In our judgment it would appear that a stay for sale of land under the Act may only be made after an order for sale has been ordered and some interested person has made a claim to the land. This, of course, may be on the basis that his interest will be prejudiced if the land is sold. It will be recalled that no sale was ordered in this case and consequently no person, if there is any at all, made any claim to the land. The refusal to order sale does not seem to have been justified and was, in our judgment, wrong.

So far as ground (vi) is concerned, we agree with Mr. Savjani that no special circumstances to justify stay of sale have been shown. This action was started in 1979 and judgment was obtained in 1981. It has been stated that the respondent has been paying another debt and it seems that although this other debt has already been paid off, no effort is being made to pay off this debt. It was also mentioned that the only other income the respondent has is a small pension. It was not stated how small the pension is. But what is clear is that there is some income from the house, which is the subject of this action. There is no indication so far that someone or some body is interested in it. There is another significant factor. The Court, on 28th April, 1986, ordered payment of the debt by instalment but the respondent has not fulfilled the Court order. This indicates that the respondent is not keen to pay the debt.

On ground (vii), there is no justification for finding that the remedy available in Part IV of the Sheriff's Act is an extreme one and should be resorted to in very exceptional cases. In our view it is one of the ways of enforcing judgment after everything else has failed. There is nothing in this Part to suggest that the remedy should be resorted to in extreme cases. Where a debtor has some income, however small, and is also in receipt of some rental from some property which is not encumbered, it is our opinion that if he wanted to, he could apportion some of that rental to pay some debt. It is appreciated that it may be done with

difficulties and may have to do away with some luxuries. But these hard facts of life have to be endured at times. Failure to do anything in such circumstances may amount to wilful neglect to meet one's obligations.

In the circumstances we set aside the order to pay the debt by instalment and order the High Court to make an order to sell the property. We suggest that the sale be advertised in the Daily Times and in the Malawi News. This will give an opportunity to any person having an interest in the property to make his claim.

The respondent will pay the costs of this appeal and the application in the lower court.

DELIVERED at Blantyre this 25th day of August, 1988.

(Signed):



Makuta, C.J.

(Signed):



Unyolo, J.A.

(Signed):



Mbarika, J.A.