

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 450 OF 1998**

BETWEEN:

ELLEN KUPINGANI MWALE 1ST PLAINTIFF

ZELIFA CHENDAWAKA2ND PLAINTIFF

AND

CECILIA TAMANDA KADZAMIRADEFENDANT

CORAM: POTANI, REGISTRAR

Nkhono, Counsel for the Judgment Creditor Mulele, Counsel for the Judgment Debtor

Ngutwa, Counsel for the Garnishee

RULING

By this application, the judgment creditor, Mbendera Chibambo and Associates, seeks an order of this court declaring as absolute, the garnishee order nisi obtained on January 9, 2003. That garnishee order nisi directed that any sums of money not exceeding K4,398,000.00 due from the garnishee, Malawi Revenue Authority, to the judgment debtor, the Estate of Late Dr. Kamuzu Banda, be attached to satisfy a judgment obtained by the judgment creditor against the said Estate on November 27, 2002.

It is trite law that for garnishee proceedings to succeed, there must be ample proof that there are sums due to the judgment debtor from the garnishee. Thus, there must be a debtor and creditor relationship between the garnishee and the judgment debtor. It came out clearly in the course of the hearing that as at the time the garnishee order nisi was being made, the garnishee was indebted to the judgment

debtor in the sum of K2,703,300.00 being rentals payable to the judgment debtor. The order absolute the judgment creditor seeks can therefore be made only to the extent of that amount, if at all. The judgment creditor would have to resort to other avenues to recover the balance of the judgment debt.

It was contended by counsel for the judgment debtor that it would offend the judgment of November 27, 2002 if the judgment creditor were to be paid all the sums due to the judgment debtor from the garnishee since that judgment took cognizance of other

judgment creditors who ought to benefit as well. It was further observed by counsel that the judgment specifically made provision for an initial payment of 33.33 percent of the sums due to each of the creditors and that the judgment creditor would therefore only be entitled to payment of the sum of K1,465,853.40.

On his part, counsel for the judgment creditor submitted that where there are several creditors laying a claim on an estate which is solvent, whichever creditor institutes garnishee proceedings first is entitled to be paid any sums that are found payable. A number of cases were cited in support of such a submission including the case of *Pritchard v. Westminster Bank Limited* (1969) 1 All ER 359. With regard to the contention that the judgment creditor can only be entitled to payment of 33.3 percent of what is owing, counsel argued that that was conditional on the judgment debtor effecting payment within 30 days from November 27, 2002 when the judgment was made and as the judgment debtor never complied with that conditionality the benefit accruing to the judgment debtor from the judgment order fell off. Order 45 rule 10 of Rules of the Supreme Court was cited in support of this submission.

I have given the matter, especially the arguments by both parties, thoughtful consideration. I have also had occasion to look at the decisions in some of the cases cited and the provisions of Order 45 rule 10. In my view, order 45 rule 10 is relevant and ought apply with full force to the present case. It would be quite absurd to allow the judgment debtor to rely on a judgment whose terms it has failed to honour. Thus, by not making the payments ordered by the judgment of November 27, 2002, within the stipulated 30 days, the judgment debtor cannot seek the protection of the same judgment. Furthermore, it is my finding that the judgment creditor having not been paid within the 30 days, as ordered, was perfectly entitled to take any steps, including the present proceedings, in order to recover the sums due from the judgment debtor. As was stated by counsel for the judgment creditor, there is nothing to stop the judgment creditor from reaping the fruits of its diligence by instituting the garnishee proceedings upon the judgment debtor defaulting in complying with the judgment of November 27, 2002. Perhaps, I should state that had the judgment debtor complied with the judgment, I would have come to a different conclusion on this application. I thus order that the garnishee order nisi be made absolute to the extent of the total sum of K2,703,300.00 due from the garnishee to the judgment debtor.

H S B Potani
REGISTRAR