



MALAWI

IN THE HIGH COURT OF MALAWI

**PRINCIPAL REGISTRY
CIVIL CAUSE NO. 919 OF 2003**

BETWEEN:

MR E.K.

THOMSON.....

...PLAINTIFF

-and-

LEYLAND DAF (MALAWI)

LTD.....DEFENDANT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr P. Nkhono, of Counsel for the Plaintiff

Mr J. M. Chirwa, of Counsel for the Defendant

Mr Mdala, Official Interpreter

Date of hearing: 20th January 2004

Date of Ruling: 18th August 2004

Editorial Note

The Plaintiff has appealed against the order of the Assistant Registrar. The order was to the effect that sheriff fees and expenses were still payable notwithstanding the fact that execution proceeded on an irregular judgment.

This Court is, therefore, being called upon in this appeal to determine whether sheriff fees and expenses are indeed payable.

RULING

Kapanda, J.

Introduction

On 4th April 2003 the Plaintiff commenced an action against the Defendant. It was so commenced by way of a writ of summons. On or about the 9th day of April 2003 the Defendant filed an acknowledgment of service where the Defendant indicated that it was going to defend the proceedings. This notwithstanding, the Plaintiff obtained a judgment in default of defence. Indeed, the Plaintiff obtained such judgment on 9th May 2003.

The Plaintiff proceeded to request the Sheriff of Malawi to enforce the said default judgment. This comes out clearly in the writ of *fifa* issued by the Court on the 19th of May 2003. The Defendant then moved to have execution of the judgment of 9th May 2003 stayed. Thereafter, the Defendant successfully had the judgment obtained by the Plaintiff set aside on 14th July 2003.

Further, the record shows that the Defendant obtained an order that it should not pay the sheriff fees. As a matter of fact, the Assistant Registrar ordered that the sheriff fees and expenses should be paid by the Plaintiff.

It is this order, that the Plaintiff pays the sheriff fees and expenses, which is the subject-matter of this appeal.

Facts

The facts of this case have already been captured in the introduction to this Ruling. However, there is no harm in repeating and summarizing the said facts. In a nutshell, the following is what gave rise to this appeal:

The Plaintiff commenced an action against the Defendant. It was by way of a writ of summons. The record clearly shows that the Plaintiff obtained an irregular judgment against the Defendant. Following this judgment, the Plaintiff caused execution to be levied against the Defendant.

As earlier mentioned, the Defendant applied to have the judgment set aside. The Assistant Registrar did set aside the judgment and the warrant of execution. He proceeded further to order that the Plaintiff should bear the sheriff fees and expenses incurred in the process of execution of the said judgment.

The Appeal

As stated earlier, the learned Assistant Registrar had ordered that the sheriff fees and expenses be paid by the Plaintiff. The said order was made on 20th October 2003. The Plaintiff is aggrieved with the said decision of the Assistant Registrar. Consequently, the Plaintiff wants the Ruling of the Assistant Registrar reversed.

The Order of the Assistant Registrar

The Assistant Registrar's order was a short and precise one. The relevant parts of it were as follows:

“Mr Nkhono went on to argue that although he conceded the irregularity in the default judgment herein, the Sheriff of Malawi was at law not entitled to any fees as poundage fees on money having been brought in as a result of the execution herein. He cited the English case of **Mortimore vs Cragg Ex Parte Sheriff of Surrey** 1878 3 C.P.D. 216. This Court went no further than the decision of Chipeta J. in **Novatech Engineering vs Malawi Housing Corporation** Civil Cause Number 389 of 2001 in which the Honourable Judge was faced with a similar issue. Justice Chipeta stated the law applicable, namely; that the Sheriff of Malawi is entitled to fees chargeable once seizure is made, even where execution is withdrawn, satisfied or stopped. The cases of **Maunde vs National Bank of Malawi and Others** [1981-83]10 M.L.R. 392 and **Sheriff of Malawi vs Press Produce Limited** [1987-89] M.L.R. 241 were cited.

The law having been able stated in the three above cited cases this Court finds that Mr Nkhono's argument can not stand in the face of our own case law on the point. As such this Court determines that herein sheriff fees and expenses are payable as the execution in question proceeded on the irregular judgment. The said fees should be paid within 14 days of the date of this order.” (emphasis added by me)

It is the above order that the Plaintiff is appealing against. Indeed, the Plaintiff is aggrieved by the decision of the Assistant Registrar to the effect that the Plaintiff should be responsible for the

payment of the sheriff fees and expenses. Hence, the appeal herein.

The Argument(s) by the Plaintiff

As I see it, the basic argument advanced by Mr Nkhono of Counsel is that the sheriff is not entitled to the fees. He opines that that since the right of the sheriff to fees are closely linked up to the party who issued execution then the Sheriff can not get fees where the judgment to be executed is found to be irregular. In support of this argument, the Plaintiff has called in aid the English case of **Mortimore vs Cragg Ex parte Sherrif of Surrey**.¹

The Plaintiff, therefore, urges this Court to follow the English decision quoted above and find that he is not liable to pay the sheriff's fees and expenses. In point of fact, the Plaintiff wants this Court to reverse the order of the learned Assistant Registrar.

It must be observed that the Plaintiff either deliberately, or by mistake, seems to be confusing what the Assistant Registrar ordered. The record is clear that the order of the Assistant Registrar does not mention anywhere that the Sheriff of Malawi should be paid, inter alia, poundage. Consequently, any argument about poundage is misplaced. So too the **Mortimore** case is of no relevance to the present matter. In the instant case the issue is whether sheriff's fees and expenses are payable notwithstanding the judgment having been irregular.

As I understand it, poundage is a commission that is payable to a

¹ [1878]3 CP 216

Sheriff after money is actually recovered.² Indeed, as rightly put in **Mortimore vs Cragg**,³ the sheriff would not receive poundage where seizure was wrongful or if it is withdrawn by direction of law. As a matter of law if the warrant of execution is vacated or set aside before the execution is completed the sheriff is not entitled to poundage. However, as shall be seen shortly, whether he gets his statutory fees and expenses is governed by a different law altogether.

Questions for Determination

The appeal to this Court is from the decision of the Assistant Registrar. It is, as a matter of trite law, a rehearing of the matter that was before the said Assistant Registrar. Consequently, this Court must determine whether the sheriff fees and expenses are payable herein albeit that the judgment was irregular. Further, the Court must decide who pays the said fees and expenses if they are payable at all.

Consideration of the issues

Entitlement to fees

It is settled law that before any prescribed fees is payable a formal seizure must have been made under a warrant of execution.⁴ Further, it is my understanding of the law that whether or not a seizure has been made is a question of fact.⁵

There is no dispute that there was seizure of the Defendants'

² Bryan A. Garner, Black's Law Dictionary, 7th ed. West group St. Paul, Minn. 1995

³ [1878]3 C.P. 216 at 219

⁴ Nash vs Dickenson [1867] LR 2 C.P. 252

⁵ *Lloyds and Scottish Finance Limited vs Modern Cars and Caravans (Kingston) Limited* [1966]1 QB 764; [1964] 2 All ER 732

property. Actually, there is evidence on record that the Defendant's motor vehicle had been seized in execution on 10th July 2003. It is, therefore, found as a fact that there was in point of fact seizure that could entitle the sheriff to prescribed fees.

However, the above finding does not dispose of the matter herein. The Court must still determine whether the Sheriff herein should get his fees in view of the fact that the judgment was set aside on grounds of irregularity.

Who pays fees when execution is stopped because of irregularity of judgment?

As I understand it, the law is that the person at whose instance the Sheriff proceeded to levy execution must be responsible for payment of sheriff fees where judgment is found to be irregular.⁶ The Plaintiff can not run away from liability by attempting to argue that since the judgment is irregular then sheriff fees are not payable. Indeed, the Sheriff did all that he was required or permitted to do to earn his fees. If he had not been requested by the Plaintiff to levy execution on the Defendant the Sheriff would not have earned the

⁶ *Maunde vs National Bank of Malawi, Chinguwo and Mgogo* 10 MLR 392 cited with approval in *Novatech Engineering vs Malawi Housing Corporation* C.C. No. 389 of 2001 High Court decision of 17th September 2001 (unreported).

fees. The fact that the judgment was irregular should not, and can not, disentitle the Sheriff the statutory fees that he earned. As a matter of fact, the Plaintiff is the one who caused this irregular judgment to be issued. Further, the Plaintiff did not only obtain an irregular judgment and stop there. He proceeded to request the Sheriff to levy execution. Surely, the Plaintiff should pay for his folly. Thus, the Assistant Registrar did not err in ordering that the Plaintiff should pay the statutory fees the Sheriff was entitled to. Accordingly, the order of the Assistant Registrar on sheriff fees can not be reversed. It is so ordered that the Sheriff is actually entitled to be paid his fees on the amount which would have been received if the execution had not been stopped due to the irregularity in the way the judgment was obtained.

Sheriff expenses

There is no disputing of the fact that the Sheriff incurred expenses at the time he went to levy execution on the Defendant. These must be paid by the Plaintiff as well for it is him who made the Sheriff incur these expenses in the process of executing an irregular judgment.

As stated above, the law is that if execution is stopped, due to an irregularity in the way judgment was obtained, the Sheriff is entitled to his fees as against the person issuing the execution. Again, the Assistant Registrar's order as regards payment sheriff expenses by the

Plaintiff can not be faulted.

Conclusion

By reason of the findings and observations made above this Court refuses to reverse the order of the learned Assistant Registrar. The Court finds and concludes that the sheriff fees and expenses are still payable albeit that the execution proceeded on an irregular judgment. Further, the Plaintiff is the one to pay the said sheriff fees and expenses.

The long and short of it is that this appeal is dismissed in its entirety.

Made in Chambers this 18th day of August 2004 at the Principal Registry, Blantyre.

F.E. Kapanda
JUDGE

Ruling - Civil Cause No. 919 of 2003 - E.K. Thomson -vs- Leyland Daf (MW) Limited