

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE 3307 OF 2004

BETWEEN:

T. OSMAN.....PLAINTIFF

and

THE REGISTERED TRUSTEES OF
UNITED DEMOCRATIC FRONT.....DEFENDANT

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

Mr Masumbu, of Counsel for the Plaintiff

Mr V. Nyimba, of Counsel for the Claimant

Mr Mlauzi, for Sheriff of Malawi

Mdala, Official Interpreter

Place and dates of hearing: Blantyre 11th March 2005 and 17th March 2005

Date of ruling : 25th August 2005

RULING

Kapanda, J:

Introduction

The Assistant Registrar had ordered an amendment of the parties to the action that was commenced by the Plaintiff. In point of fact, the Assistant Registrar made an order to add Dr Bakili Muluzi as a party to these proceedings after a default judgment had been already been entered against the Registered Trustees of the United Democratic Front and a warrant of execution issued against the latter. The order of the Assistant Registrar effectively made Dr Bakili Muluzi, hereinafter referred to as a second Defendant, after a writ of *fi.fa* had been issued and purportedly executed upon the first Defendant by the Sheriff of Malawi.

The second Defendant is aggrieved with the decision of the Assistant Registrar making him a party to the proceedings after he had claimed the goods that were levied in execution. Accordingly, in this matter before me, the 2nd Defendant is appealing against the said decision of the Assistant Registrar. Further, there is an Interpleader Summons issued by the Sheriff of Malawi as a result of a claim of ownership of a motor vehicle that was seized in execution. Indeed, the Court herein has been called upon to decide on the appeal by the 2nd Defendant and the Interpleader Summons by the Sheriff of Malawi.

Facts

The facts of this case have somehow been captured in the introduction to this ruling. However, the said facts given in the introduction to this Ruling are so bare for one to get a better understanding of what is obtaining in this matter. It is, therefore, important that further facts be given in this matter. I will as far as practicable, give such facts in a chronological order. In a summary, the said facts of this case are as follows:-

Commencement of action and the parties

On 19th November 2004 the Plaintiff commenced an action, by way of a Writ of Summons, against the Registered Trustees of the United Democratic Front-A political party. There was a statement of claim endorsed on the said Writ of Summons. The essence of it was that the Plaintiff was, inter alia, claiming from the said Registered Trustees of the United Democratic Front the sum of K993,775.00 being the cost of repairs of various motor vehicles. The Plaintiff further attached a statement showing the name of the customer the services were rendered to **viz.** The United Democratic Front Party.

The Registered Trustees of the United Democratic Front, through Maulidi and Company, filed a Notice of Intention to defend the proceedings that were commenced by the Plaintiff. The Notice of intention to defend the action by the claimant was filed on the 30th day of November 2004. However, the lawyers for the Registered Trustees of the UDF never took any further action.

Default Judgment and Writ of Fifi

The lawyers for the Registered Trustees of the United Democratic Front did not serve a defence to the action commenced by the Plaintiff as required by the rules. Accordingly, on 13th January 2005 the Plaintiff caused a Default Judgment to be entered against the said Registered Trustees of the United Democratic Front. Further, on 21st January 2005, the Plaintiff applied for a Writ of *Fi.fu* directed to the Sheriff of Malawi in respect of the matter between the Plaintiff and the Registered Trustees of the United Democratic Front. Hence, the Registrar of the High Court

of Malawi, on 24th of June 2005, commanded the Sheriff of Malawi to levy execution on the goods and chattels of the said Registered Trustees of the United Democratic Front.

Execution and claim of ownership

The Sheriff of Malawi proceeded to instruct a Bailiff of the High Court of Malawi to enforce the Warrant of Execution issued against the said Registered Trustees of United Democratic Front. The said Bailiff acted on the instruction and reported to the Sheriff of Malawi in the following manner:

“BALIFF OF HIGH COURT

P.O. BOX 90021

BANGWE

BLANTYRE

The Sheriff of Malawi

P.O. Box 30244

Chichiri

Blantyre 3

Dear Sir

Re: CIVIL CAUSE NUMBER 2043 OF 1996-TALIB OSMAN t/a CARTECH –VS-
UNITED DEMOCRATIC FRONT

I wish to report that I levied execution on the defendant’s address in Blantyre where I seized and removed Nissan Pick-up BM 3281.

State of debt is as follows:

Levy	K993,775.00
Cost	50.00
Interest	<u>4,140.73</u>
	K997,965.73
Sheriff's fees	199,593.15
Transport	8,000.00
Police	<u>2,400.00</u>
	<u>K1,209,958.88</u>

Yours faithfully

(Signed)

V.G. Phiri

As will be noted, the report does not indicate the date when the Bailiff levied execution on the goods of the Registered Trustees of the United Democratic Front. Suffice to say that the Bailiff seized and removed a motor vehicle registration No. BM 3281.

On 26th January 2005 the Sheriff of Malawi received a latter advising him that the vehicle that had been seized and removed in execution did not belong to the judgment debtor the Registered Trustees of the United Democratic Front. The letter was from a firm of lawyers and it was in the following terms:

“FROM: LEGAL WISE, P.O. BOX 990, BLANTYRE
TO : THE SHERIFF OF MALAWI, LIMBE
DATE : 26TH JANUARY 2005
SUBJECT: **CLAIM UNDER SECTION 20 OF SHERIFF ACT**
DR BAKILI MULUZI'S VEHICLE REG. NO. BM 3281
NISSAN TWINCAB

Acting upon instructions from Dr Bakili Muluzi (our client) we claim from you the above captioned motor vehicle [that] has been seized by one of your Bailiffs Mr V.G. Phiri on warrant for execution under Civil Cause No. 3307 of 2004.

The said vehicle does not belong to UDF, but the owner is Dr Bakili Muluzi according to a recent decided case in which MRA had seized the same vehicle among others.

We therefore expect you to release the vehicle soon, since it may not be necessary to issue interpleader summons.

Yours faithfully

(Signed)

Viva Nyimba

LEGAL WISE

The Deputy Sheriff of Malawi advised the lawyers for the Plaintiff of the claim of ownership by Dr Bakili Muluzi. The advice is contained in a letter to Plaintiff's and claimants' lawyers dated 3rd February 2005. Further, the Deputy Sheriff informed the Plaintiff's lawyers to indicate whether or not they had any objections to the claim and that if there were no such comments from them he was going to release the motor vehicle to the claimant (Dr Bakili Muluzi).

Application to add the claimant as a party

The Plaintiffs lawyer's response to the letter of the Deputy Sheriff of 3rd February was by way of an application to add Dr Bakili Muluzi as a party to the proceedings. The application was made by Summons on 7th February 2005 and made returnable before Registrar on the 15th of February 2005. The Plaintiff was granted an order that Dr Elson Bakili Muluzi should be added as a second Defendant. The Assistant Registrar, in my judgment, based his decision to add Dr Muluzi on the following reasons:

“This Court now has to consider the law applicable as cited by both Counsel(s.) Indeed note 15/6/7 to Order 15 rule 6 Rules of Supreme [Court] provides that this Court has no jurisdiction to order third parties to be added as defendants where the cause or matter is not liable to be defeated by the non-joinder, where the third parties were not persons whose presence was necessary to enable the Court effectually to adjudicate on all questions involved in the action.

This Court finds that if the Plaintiff sued defendant and intended defendant separately the common question would indeed arise as to who would be responsible for payment of repair costs claimed herein. That is indeed the main consideration on this application as submitted by the Plaintiff. The Defendant still has an intention to defend this action though it has not put up a defence to the Plaintiff’s claim. And indeed this Court ought not rule out the possibility that the Defendant may point to the intended Defendant as the one responsible for repair costs to his own vehicles. And so the fact that the Defendant has not put up a defence herein shall not prevent this Court from ordering a joinder of the intended 2nd Defendant as a Defendant herein. The joinder is necessary for this Court effectually to determine the question of who is responsible for the repair costs claimed herein. Should it be the Defendant user or the owner of the vehicles himself?

Mr Nyimba tried [to] argue that the intended Defendant is indirectly interested in this matter. But this Court is of the view that Mr Masumbu was correct in his view that the intended 2nd Defendant is actually directly connected to this matter. The vehicles in relation to which repair costs are claimed herein are his. There can be no better direct connection in the view of this Court.

Further this Court notes the submissions of Mr Nyimba on the separate personality of the intended 2nd Defendant and the Defendant and the Defendant but finds the same to have no bearing on the instant application. Equally this Court finds that the issues of privity of contract between the Plaintiff and the Defendant vis-a-vis the intended 2nd Defendant raised by Mr Nyimba to be matters pertinent only to the trial of this action and not to the instant application. And so such matters shall not be discussed at all by this Court.

In the premises this Court finds that for this Court effectually to adjudicate to the matters in this action it is necessary that the intended 2nd Defendant be joined as a party to this action. And so it is ordered that Dr Elson Bakili Muluzi be added as a 2nd Defendant to this action.”

The 2nd Defendant (Dr Muluzi) is aggrieved by the decision of the Assistant Registrar to add him as a party to the action. Hence, the appeal herein.

Inter pleader Summons

It would appear that the Deputy Sheriff never received any comments or objections regarding the claim by Dr Muluzi. Indeed, the Deputy Sheriff was obviously not aware that there was an application to add the claimant (Dr Muluzi) as a party to the proceedings. This is borne out by the fact that, on 9th February 2005, the Sheriff of Malawi took out an Interpleader Summons. As will be recalled, the Plaintiff applied for an order to add the claimant as a party on 7th February 2005 and it was heard on 15th February 2005. The Interpleader Summons was taken out on 9th February 2005 and made returnable before this Court on 1st March 2005 although it was actually heard on 17th March 2005. In saying this I am alive to the fact that the Deputy Sheriff (Mr Malauzi) purported to show that he received an objection to the claim from the Plaintiff on 3rd February 2005. Surprisingly, Mr Malauzi never produced in evidence the said reply from the Plaintiff. Further, the Court is aware that the Deputy Sheriff is contending that as far as he is concerned the Bailiff levied on a proper party. The question whether the execution was levied on proper party will soon be determined in this ruling. It will suffice to put it here that the claimant (2nd Defendant) is claiming that the property seized and moved in execution does not belong to Registered Trustees of United Democratic Front (1st Defendant).

Accordingly, apart from determining the appeal against the decision of the Assistant Registrar, this Court has to make a determination on the Interpleader Summons.

Questions For Determination

As stated earlier, the Court has to deal with two matters in this ruling i.e. an appeal against the decision of the Assistant Registrar and an Interpleader Summons. Since the appeal is from a decision of the Assistant Registrar the Court has to rehear the matter that was before the said Assistant Registrar. Thus, this Court must decide whether or not Dr Muluzi should be added as a party to the proceedings that were commenced by the Plaintiff on 19th November 2004.

Further, indeed in view of what this Court said earlier on, there is need for me to adjudicate on the Interpleader Summons. It well to observe that, in my opinion, in the event that this Court finds that Dr Muluzi should be added as a party then it would not be necessary to extensively deal with the Interpleader Summons before me. However, this observation does not in any way mean that a determination of the appeal will automatically mean the Court will overlook the Interpleader Summons. Far from it.

Consideration of the Issues

Joining of 2nd Defendant as a party to the proceedings

It is trite law that the jurisdiction to add a party depends on the rule that a party may only be added when it is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the cause or matter^{1[1]}. As I understand it, the claim by Dr Muluzi was not a dispute between him and the Plaintiff requiring the former to be added as a party. Actually, at the time Dr Muluzi was added as a party there was no question before the Court that required to be effectually and completely settled. This is so considering that there was a default judgment entered against the Registered Trustees of the United Democratic Front. On the judgment being entered there was no further the Court had no dispute to settle. What remained, in my view, was only enforcement of the judgment against the judgment debtor. It was, therefore, wrong for the Assistant Registrar to add Dr Muluzi as a party to the action when what remained was only enforcement of judgment. Indeed, it would appear to me that the addition of Dr Muluzi was meant to defeat the claim by him over the vehicle that was seized in execution. In fact, this is analogous to a situation where a Court allows a party or a cause of

^{1[1]} *The Malawi Electoral Commission vs Aleke Banda and John Tembo* MSCA Misc. Civil Appeal No. 2 of 2005 (unreported) MSCA decision of 5th July 2005.

action to be added where, if it were allowed, it would deny a Defendant a legal defence which would be wrong.^{2[2]} The Assistant Registrar, in my judgment, was misled by the Plaintiff into thinking that there was any further question to be determined at that time. There having been no defence to the action that the Plaintiff initially commenced against the Registered Trustees of the United Democratic Front there was no action existing between the parties (Plaintiff and UDF) at the time the application to add a party was made. Accordingly, it was not necessary to add Dr Muluzi as a second Defendant so as to enable the Assistant Registrar to adjudicate upon and settle.^{3[3]} The Plaintiff, in my opinion wants to add a party for purposes of execution. That is not the framework of Order 15 of the Rules of Supreme Court under which the application by the Plaintiff was made. I hasten to add that it is an intolerable abuse of process to add a party with a view to levy execution. Indeed, this Court will not allow that it be used as an instrument in the process of circumventing the law as regards whose property ought to be seized in execution.

For the reasons give above, this Court holds that the Assistant Registrar erred in adding Dr Bakili Muluzi as a party. The long and short of it is that the appeal, as regards the addition of Dr Bakili Muluzi as a party, succeeds with costs.

The Interpleader issue

It is a settled principle of law that a warrant of execution is supposed to be enforced on the goods of a judgment debtor. As it were, if a Sheriff or Bailiff or Sheriff's Officers was to levy execution on a person who is not such a judgment debtor then that would be acting against this principle of law. Indeed, where an execution is levied on a person not a party to proceedings the Court would not hesitate to give relief to a wronged party in an Interpleader Summons.

As I see it, there is no denying of the fact that having found that the 2nd Defendant is not a party to these proceedings it naturally follows that only the goods and chattels of the Registered Trustees of the United Democratic Front would be the subject of levy. Indeed, in the absence of the 2nd Defendant as a party to these proceedings, it logically follows that the warrant of execution commands the Sheriff of Malawi to seize the goods and chattels of only the Registered

^{2[2]} Ibid.

^{3[3]} Ibid.

Trustees of the United Democratic Front and not any other party. The question that then comes to mind is whether the motor vehicle that was seized in execution belong to the Registered Trustees of the United Democratic Front. Put differently, this Court must determine whether the motor vehicle, the subject matter of the Interpleader Summons, belongs to the only and/or remaining judgment debtor.

The Sheriff of Malawi, through Mr Mlauzi, purported to show that he executed the warrant on a vehicle that was clearly marked United Democratic Front. Thus, so his contention goes, as far as he is concerned he levied on proper property. The claimant has submitted that the vehicle's registration certificate and sale invoice show that the vehicle belongs to him. Further, it is the view of the claimant that since the vehicle is registered in his name it ought not to have been seized in execution. The judgment creditor, on the other hand, has taken issue with the type of evidence offered by the claimant. It is the contention of the judgment creditor that there is no evidence by the claimant himself to prove ownership of the vehicle. This Court disagrees with both the contentions of both the judgment creditor and the Sheriff of Malawi that the execution was levied on the property of the proper party to these proceedings. For starters, it is well to observe that this Court, can not be expected to shut its eyes to the obvious fact obtaining in a public document that is before this Court. The registration book that is in evidence in this matter, a public document, clearly shows that the vehicle, the subject matter of this Interpleader Summons, is registered in the name of B. Muluzi and not the Registered Trustees of the United Democratic Front. That fact of registration, it is a matter of trite law, means that B. Muluzi – the claimant herein – is prima facie the owner of the vehicle that was seized in execution. In saying this I am alive to the fact that the Registration Certificate before this Court clearly shows that the vehicle is registered in the name of B. Muluzi. Further, it is important to note that the said Registration Certificate is a public document. Accordingly, the evidence of any particulars in this public document is receivable in evidence without any further proof of what is contained in this Registration Certificate.^{4[4]} Moreover, this Court would wish to take judicial notice of the High Court judgment that categorically said that the vehicles that are marked “United Democratic Front” do not actually belong to this political party but the claimant.

^{4[4]} Section of the Evidence Act, 1845, of the UK, a statute of general application, provides that any particular in a public document shall be receivable in evidence without any further proof of that particular.

The long and short of it is that the question raised by the Interpleader Summons has been answered in favour of the claimant. The Sheriff shall, and is hereby ordered to, immediately release the vehicle to the claimant Dr Bakili Muluzi.

Conclusion

The appeal by the 2nd Defendant has succeeded. Consequently, the order by the Assistant Registrar adding Dr Bakili Muluzi as a party to these proceedings is set aside with costs. Additionally, the Sheriff is hereby ordered to forthwith release the motor vehicle that was seized in execution to the claimant Dr Bakili Muluzi.

Pronounced in Chambers this 25th day of August 2005 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE
