



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1733 OF 2007

BETWEEN:

UK SECURITY PLAINTIFF

AND

CARGO MARKETING INTERNATIONAL LTD.....DEFENDANT
CARGO MANAGEMENT LOGISTICSCLAIMANT

CORAM: THE HONOURABLE MR JUSTICE J.S. MANYUNGWA

Mrs Movete, of Counsel, for the claimant

Plaintiff – absent

Defendant-absent

Mrs Mthunzi-Official Interpreter

ORDER

Manyungwa, J.

This is an interpleader summons by the claimant made under Order 17 of Courts Act and Section 20 of the Sheriff's Act, requiring the defendant, the plaintiff and the sheriff to appear and state the nature and particulars of their respective claims to the execution creditor, execution debtor and the sheriff to the good and chattels seized by the above sheriff under a writ of *feri facias*. There is an affidavit in support of the application by the claimant sworn by Mr Flemings Kapunda.

The facts show that the plaintiff namely UK Security obtained default judgement against the defendant for the sum of MK305, 500.00 and interest at 3% above the base bank lending rate from invoice dates until payment.

Following the said default judgement, a writ of *fieri facis* was issued. It would appear that instead of levying execution on the defendant, the sheriff, for whatever reason, levied execution on the claimant, According to the affidavit of Flemings Kapunda, Managing Partner of the claimant, Cargo Management Logistics, who together with Mylie Bridget Kapunda are the proprietors of the claimant, a company that was registered under the business Names Registration Act as company No 79785, as is evident from exhibit “**FK2**”, a copy of the certificate of registration. The defendant is a limited liability company duly registered under the Companies Act with two shareholders namely Peter Rodge Chalton and David Leslie Girmes as is evident from exhibit “**KF2**” a certificate of Registration and particulars of shareholders Further, it is deponed that Mr Flemings Kapunda, was at one time a director in the defendant company, and that this was so because the shareholders in the defendant company needed a local director, so the said Mr Kapunda used to work for the defendant company but resigned from the defendant’s employment on 28th July, 2006 as shown by exhibit FK3, a letter of resignation.

Further, it would appear, that perhaps the confusion arose because the claimant company, Cargo Management Logistics, is occupying the same premises that were formerly occupied by Cargo Marketing International Limited, the defendant company. However, as per the affidavit of Mr Kapunda, the said Kapunda never owned any shareholding interest in the defendant company. This notwithstanding however, the claimant was visited by Mr Ngwata, a bailiff of the sheriff of Malawi, and despite the explanations by the deponent that the defendant company and the plaintiff company were different, this explanation was not appreciated, and subsequently a Mr Kachasu of Trust Auctioneers executed on the property of the claimant. Following this execution, the claimant obtained a stay of execution, and this inter - pleader summons therefore is as a consequence to claim the goods that were, in the view of the claimant, unlawfully seized.

ISSUE(S) FOR DETERMINATION:

The main issue for the determination of the court is whether the claimant is entitled to the goods that were seized by the sheriff.

THE LAW:

Section 11 of the Courts Act provides as follows:-

S11 “Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have

(a) Jurisdiction

(111) to grant relief by way of interpleader where the person seeking relief is under liability for any debt money or goods or chattels for or in respect of which he has been or expects to be sued by two or more parties making adverse claims thereon, and to grant such relief where a sheriff or other officer of the court is charged with the execution of process of the High Court and claim is made to any money or goods or chattels taken or intended to be taken in execution under any process or to the proceeds or value of any such goods or chattels or by any person other than the person against whom the process is issued, and to order the sale of any property subject to interpleader proceedings:

And Section 20 of the Sheriffs Act provides

S20 (1) If a person (hereinafter in this section referred to as the claimant) claims any movable property seized in execution under any process or the proceeds or value thereof he shall first give notice in writing thereof to the sheriff in such form, if any, as may be prescribed. The sheriff shall thereupon serve copies of such notice in the manner prescribed for the service of any document of the court out of which the process is issued upon the execution creditor and upon any other person he considers to be interested in the property.

.....
(3) If the claimant's claim is disputed, the person disputing it shall give notice in writing in such form, if any, as may be prescribed to the sheriff who shall forth with apply to the court from summons calling before the party at whose instance the process issued and the claimant.

In an inter-pleader action, the action is taken by the rightful owner whose property has been wrongfully taken by the sheriff in due execution of process to satisfy judgement debts of another. The High Court has jurisdiction in respect of interpleader actions as per Section 11 of the Courts Act.

In inter - pleader actions where the court has to decide title to the property or debt it is a requirement that the claim must be actual and not merely anticipated. See Isaac v. Spilsbury¹. There must have been an actual seizure or an intention by the sheriff to seize as was stated in Day v Carr². The fact that the goods are seized in the possession of the judgement debtor does not, of course, affect the sheriffs right to interplead. See Allen v

¹ Isaac v Spilsbury (1833) 2 Dowl. 211

² Day v Carr (1852) 7 Ext. 883

Gibbon¹. But if the sheriff, after seizure has withdrawn from possession, **(Moore v Howkins)**² or delivered up the goods seized to the claim out **(Braine v Hunt)**³ or sold them and paid the proceeds to the execution creditor **(Anderson v Calloway)**⁴, the court will not grant him relief except under Order 17 r 2(3)

It is important however for the claimant to satisfy the court that the goods seized are his own and not of the judgement debtor or that he owns part of the goods seized. In the case of **Tarmahomed and Tarmahomed and Company v Mlenga**⁵ the sheriff of Malawi interpleaded in the proceedings between the parties and sought determination of the question whether one party could levy execution on the other's property. Villiera, J as he then was held that the defendant would not be allowed to levy execution on the plaintiff's property, since the sheriff's Act (cap: 3:05) provided that only the property of the judgement debtor could be seized and sold to enforce payment and the plaintiffs were not such a debtor. The learned judge had this to say at page 456

“It is, I think, clear from the provisions of the Sheriff's Act (Cap 3:05) that execution can only be levied on the judgement debtor's property. Section 6(2) of the Act provides as follows:-

‘The court on application in the prescribed manner of the judgement creditor shall cause to be issued a warrant of seizure and sell the moveable property of the judgement debtor whenever it may be found in Malawi to enforce payment of the amount due under judgement and the costs of the execution.’”

See also: **Isaac Hassan v Wilbert Mlenga and Teleza Daina Mlenga**⁶

In the instant case, the procedure required by the sheriffs Act was duly followed. The goods that are being claimed by the claimant were actually seized by the sheriff, although they were later returned to the claimant. In the case of **Swift Transport Services (Private) Limited and Burnette and Deane Ltd v Cooper Diesel (Private) Limited and Halls Garage**⁷ Cram J held:

¹ **Allen Gibbon** (1833) 2 Dowl 292

² **Moore v Hawkin** (1894) 43 W. R 235

³ **Braine v. Hunt** (1834) 2 Dowl 391

⁴ **Anderson v Calloway (1833) 1 Dowl. 636**

⁵ **Tarmahomed and Tarmahomed & Company v Mlenga** 9 MLR 454

⁶ **Isaac Hassan v Wilbert Mlenga and Teleza Mlenga** cc 158/77

⁷ **Swift Transport Services (Private) Limited and Burnette and Deane Ltd v. Cooper Diesel (Private) Limited and Halls Garage** 1961-63 ALR Mal. 146

“ A sheriff will be liable in tort for seizing goods in the execution of his duty if he had or might by reasonable inquiry have obtained notice that the goods were not the property of the judgement debtor”

Consequently, it is my finding that the claimant, Cargo Management Logistics, is an entirely different entity from Cargo Marketing International Limited and that the property that was executed belonged to the claimant and as such the execution herein was wrongful. Secondly, since as I have found that the execution was wrongful, which execution could have been avoided had there be due diligence on the part of the plaintiff, I therefore order that the plaintiff, should and is condemned in costs of these proceedings.

Pronounced in Chambers at Principal Registry this 31st day of July, 2008.

Joselph S. Manyungwa
JUDGE