



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NO 16 OF 2017

BETWEEN

EDWIN SEYANI.....PLAINTIFF

-AND-

CHARLES STEWART DAY OLD CHICKS LIMITED.....DEFENDANT

CORAM

H/H B. CHITSAKAMILE, ASSISTANT REGISTRAR

Mr Francis Kaduya for the Applicant

Mr Maxwell Tembo for the Respondent

Alexander Tepeka, Official Interpreter

RULING

Introduction

The defendants took out summons to set aside warrant of execution under the inherent jurisdiction of the court. The gist of the defendants' application is that collection costs are not recoverable as against a defendant and the plaintiff therefore should not have executed on the defendant for the same. Counsel for the defendant argued on the authority of **Ecobank Ltd V. Kalamula, Civil cause number 434 of 2013** that the provision for 15% collection costs is no longer part of the law. On this premise he submitted that the collection was wrongly done and the warrant needed to be set aside and the money returned to the defendant.

In his reply, counsel for the plaintiff refrained from tackling the issue of the legality of claiming collection costs stating that he had not read the decision that was being relied on. He however emphasized that the warrant of

execution had been regularly issued and that he was in doubt whether the defendants could make this application under the applicable rules of procedure.

In the submissions that he filed later, counsel for the plaintiff has cited **Standard Bank Limited and another v. M.L Luka and 1162 others and another MSCA no 1 of 2012** and **Harry Gunda vs. Indebank Commercial Case No. 34 of 2015** where collection costs were awarded in judgments.

APPLICABLE LAW

A person who obtains a money judgment in his favour is entitled to use various mechanisms to get the money from the defendant or judgment debtor. There are several different ways of enforcing a judgment including *writ of fi fa* or warrant of execution.

A court issues a *writ of fi fa* on application by a judgment creditor whether it be for the recovery of a judgment sum or costs. It is acceptable practice for the writ to issue immediately upon payment becoming due and without the necessity for prior notice. See; **Hopton v. Robertson (1884) 23 QBD 126**.

The court has powers to set aside a warrant of execution where it has been improperly issued even after execution has been levied. See; **O.47/1/3 RSC**. Again, the court will set aside a warrant of execution when a default judgment has been set aside under **Order 13 rule 9** or **Order 19 rule 9**.

DETERMINATION

The defendants took out the present summons under the inherent jurisdiction of the court. I am inclined to think that this was because there is no elaborate provision in the applicable rules of procedure sanctioning the step that they took. The argument by the defendants has been that the plaintiff should not have been awarded collection costs in the light of the decision in the **Ecobank case**. Counsel is resolute that according to the reasoning in the said case, the money executed for is not recoverable.

I must hasten to agree that the reading of the **Ecobank case** indeed gives the position argued by the defendants that collection costs are not recoverable where proceedings have been instituted. The plaintiff's counsel however has cited the **Harry Gunda** case where collection costs were awarded. If the citing of those cases was useful to the decision herein I would have well discussed them but I find that needless.

The default judgment on the basis of which the warrant of execution was issued remains valid to this day. Implicitly, counsel for the defendants faults

the same and would argue that it is irregular. But the said judgment is valid and the plaintiff is entitled to seek to enforce it by a mode of enforcement of his choice. Having noted what he finds to be an anomaly in the warrant of execution that stems from the default judgment, it was open to counsel for the defendants to apply to the court to set aside the judgment and with it the warrant of execution. That is where the arguments as regards the legality of claiming collection costs herein would have been well appreciated and meticulously tackled.

In the absence of such an application, I hold that I cannot have inherent jurisdiction to set aside a legitimate enforcement process that stems from a valid judgment. Further, there being an elaborate procedure for challenging regularity of default judgments and applying to set aside the same I cannot proceed under the guise of inherent jurisdiction to set aside judgment when there is no application. The best course of action available to the defendants was to apply to set aside the default judgment for irregularity which if it succeeded would have necessitated the setting aside of the warrant of execution. What the defendant has done is the proverbial putting of the cart before the horse.

DISPOSAL

The short of it is that it is my ruling that summons to set aside warrant of execution herein is misplaced and therefore without merit.

Accordingly, it is dismissed with costs.

Pronounced in chambers this 11th day of October 2017


B. Chitsakamile

ASSISTANT REGISTRAR