

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2012/HK/381

B E T W E E N;

MASAUSO BANDA
JAYEVA NYASOLO BANDA

1ST PLAINTIFF
2ND PLAINTIFF

AND

GABRIEL MATHIAS MAIKO
REUBEN SHAURY

1ST DEFENDANT
2ND DEFENDANT

Before the Honourable Mrs. Justice Judy Z. Mulongoti in chambers
on the 11th day of October, 2012

For the Plaintiffs : Mr. I. Mulenga of Iven Mulenga &
Company

For the Defendants : Mr. C. Kaela of Katongo & Company

R U L I N G

CASES REFERRED TO:

1. *STANDARD BANK LIMITED VS. BROOKS (1972) ZR 306*
2. *COLWYN LIMITED VS. BUILDELECT LIMITED SCZ APPEAL NO. 162*

LEGISLATION REFERRED TO

1. *Order 26 of the High Court Rules, Chapter 27 of the Laws of Zambia*

The Ruling relates to an application on behalf of the plaintiffs, for an order of interim attachment of property. The application was made

pursuant to Order 26 of the High Court Rules, Chapter 27 of the Laws of Zambia.

I granted the plaintiff an ex parte order of interim attachment on 22nd August, 2012 and set the 12th of September, 2012 as the date for inter partes hearing. This was after the second defendant had no objection to the truck being in police custody or anywhere else other than in the plaintiff's custody.

At the inter partes hearing, learned counsel for the plaintiff, Mr. Mulenga, relied on the supporting and replying affidavits deposed by the first plaintiff. Mr. Mulenga argued that the defendants being Tanzanians, based in Dar-es-Salaam, it would be difficult for the plaintiffs to recover from them, should judgment be in their favour. The plaintiff's goods worth 60,000 US Dollars went missing whilst in the defendant's custody under a carriage contract. The said defendants have not shown any commitment of meeting the loss and have been agitating to have their truck which the plaintiffs are holding on to be released. According to counsel, the defendants have also failed to furnish security as ordered in the ex-parte order of interim attachment.

Mr. Kaela, the learned counsel for the defendants relied on the opposing affidavit deposed by the second defendant. Mr Kaela, further contended that the case in casu was not an appropriate case in which an interim attachment of property ought to be granted. According to counsel, Order 26 of the High Court Rules was quite clear as to the prerequisite the plaintiff had to satisfy before the court could make an interim attachment order. He argued that the plaintiffs have not shown that the defendants are about to remove or dispose of the truck, the subject matter of the

application. In addition, that by so doing, they intend to obstruct or delay execution of any decree that the court may pass against them.

Furthermore, the plaintiffs have failed to show intent or delay execution, which fact has not been disputed in the replying affidavit. According to Mr. Kaela, the defendants frequent Zambia and their core business is transportation. They own other trucks which frequent Zambia and thus, in the event that any decree or execution is to be levied against them, it would not be difficult to execute. Reliance was placed on the case of **STANDARD BANK LIMITED VS. BROOKS (1)** where it was held that **“an interim attachment can only be issued where a defendant is about to remove or dispose of property with intent to obstruct or delay execution of a decree that maybe passed against him”**.

The case of **COLWYN LIMITED VS. BUILDELECT LIMITED (2)** was also cited where the above principle was followed.

Mr. Kaela further argued that the issue of quantum and monetary value of lost items was a triable issue. The issue at this stage was whether the plaintiffs had satisfied the prerequisites as outlined in Order 26. He contended that the plaintiffs had failed to show the court that they were entitled to an interim order of attachment. He urged the court to dismiss with costs and discharge the interim order of 20th August, 2012.

In response, Mr. Mulenga argued that the plaintiffs have satisfied order 26 since, firstly, the defendants have not denied that goods went missing in their custody. Secondly, they have not given any satisfactory assurance that they will compensate for the loss and thirdly, they want to take the truck out of jurisdiction. Accordingly, that the court in

STANDARD BANK case stated that there must be intent to obstruct the course of justice or that the party is about to remove or dispose of the property. That the issue of quantum be tackled at trial.

Order 26 of the High Court Rules, upon which the application is premised, It is couched thus:

“If the defendant, in any suit for an amount of value of five thousand kwacha or upwards, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction, the plaintiff may apply to the court or Judge, either at the time of the institution of the suit or, at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfill any decree that may be made against him in the suit, and, on his failing to give such security, to direct that any property movable or immovable, belonging to the defendant, shall be attached until the further order of the court or a Judge”.

It is my considered view that for the application to be sustained, the plaintiff ought to show that the defendant, with intent to obstruct or delay execution of any decree that may be passed against him, is about to dispose of or remove any such property from the jurisdiction of the court. Further, that before such property is attached, the plaintiff must show that the defendant has failed to furnish sufficient security.

The application is to be made either at the time of the institution of the suit or at any time thereafter until final judgment. The plaintiffs have made it at the institution of suit. The plaintiffs are, according to the writ of summons, claiming payment of 60,000 US Dollars, the value of the lost goods. The suit is pending determination.

In the Standard Bank case, referred to by both counsel, it was elucidated that interim attachment can only be issued where a defendant is about to remove or dispose of the property with intent to obstruct or delay execution of any decree that may be passed against him.

In the case in hand, it is noteworthy that the defendants are based in Tanzania and only came to Zambia to deliver the plaintiffs' goods. The supporting affidavit does not, in any way, reveal that the defendants are about to remove or dispose of the truck with intent to obstruct the course of justice as argued by Mr. Kaela.

This notwithstanding, from the averments on record, it appears that there is a real danger that the defendants may avoid satisfaction of judgment, if given in favour of the plaintiffs. The plaintiffs fear that once the defendants are allowed to take the truck to Tanzania, they might not return to Zambia and it will be difficult to trace them. I reasonably believe that unless an order of interim attachment is granted, the plaintiffs may not enjoy the fruits of the judgment the court may eventually grant in their favour. I find that this is an appropriate case where the court can make an interim order of attachment.

In view of the above, I make an interim order attaching the truck Registration No. T801 BAF/T874 BBR. The interim order of attachment

is made pending the final determination of the matter or until further order of this court. Each party to bear own costs. Leave to appeal is granted.

Dated the **11th** day of **October** 2012

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Judy Z. Mulongoti
HIGH COURT JUDGE