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**IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NO. 493 OF 2021
(Before Honourable Justice Dr. Mtambo)**

BETWEEN

CONTINENTAL ASSET MANAGEMENT

NOMINEES LIMITED ENFORCEMENT CREDITOR

AND

MALAWI POSTS CORPORATION..... ENFORCEMENT DEBTOR

NATIONAL BANK OF MALAWI PLC..... THIRD PARTY

Coram:	E. Mvula	:	Assistant Registrar
	A. Kauka	:	Counsel for the Enforcement Creditor
	Enforcement Debtor	:	Unrepresented/Absent
	R. Ng'omba	:	Counsel for the 1 st Third Party
	B. Ntonya	:	Court Clerk

RULING

Background

The Claimant, Enforcement Creditor in these proceedings, obtained an interim third party debt order (interim order) against the Enforcement Debtor on 2nd August, 2022. The matter was set down for hearing of an application for a final third party debt order on 2nd

September, 2022. Indeed the Enforcement Creditor and the 1st Third Party attended Court as required by the interim order. The 1st Third Party in its response indicated that the Enforcement Creditor's account had a credit balance of MK24,472,000.00 and that the same was set aside to satisfy part of the judgment debt. However, the Third Party stated that the interim order was served without an accompanying application as required by Law. A request was made by the Third Party for the application but the Enforcement Creditor did not provide the same. The Third Party relied on Order 28 rule 14 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR, 2017) which makes it mandatory to serve copies of the interim order, the application notice and any documents filed in support of the application since the word used is "shall." Further, the Third Party argued that failure to serve the application and sworn statement in support of the application is a deliberate irregularity which has always persisted from Messrs Raymond and Hughes, Lawyers for the Enforcement Creditor. The Third Party concluded by making a prayer that the Court should not make a final third party debt order and that the funds set aside should be released back to the Enforcement Debtor because of Enforcement Creditor's deliberate non-compliance with the Rules.

In response, Enforcement Creditor stated that so long as the Third Party holds funds for the Enforcement Debtor and in compliance with an order of the court, the same must be released to the Enforcement Creditor. It was also argued by the Enforcement Creditor that Order 28 r 14 (1), cited by the Third Party, does not state that a final third party debt order should not be made because certain documents were not filed. The Enforcement Creditor concluded by submitting that failure to serve the documents is an irregularity that can be cured by Order 2 of the CPR, 2017.

The court is called upon to make a determination on whether the interim third party debt order granted on 2nd August, 2022 should be made final or not.

The Law and Analysis

The Enforcement Creditor stated that Order 10 rule 1 of CPR, 2017 requires every application to be in writing and signed by the Registrar or a Judge. However, the Third Party did not file an application and did not state that he will make an oral application as such the court should not entertain the Third Party's request. The Court draws its attention

to Order 28 rule 17 of the CPR, 2017 which states that where the enforcement debtor or the third party objects to the Court making a final third party debt order, he shall file and serve written evidence stating the grounds for his objections. In compliance with Order 28 rule 17 of the CPR, 2017, the Third Party filed and served a sworn statement objecting the making of the interim third party order final. The court will therefore consider the objection that was raised by the Third Party.

Indeed Order 28 rule 14 (1) of CPR, 2017 requires copies of an interim third party debt order, application notice and any documents filed in support of an interim third party debt order to be served on both the third party and enforcement debtor. In compliance with Order 28 rule 15 of CPR, 2017, the Third Party filed a sworn statement indicating that the enforcement debtor has a credit balance of MK24,472,000.00 in its account held at the former's Victoria Avenue Service Centre. However, the Third Party contested against the court making of a final third party for the above stated reason. The rule cited by the Third Party pertains to service of an interim third party debt order and all documents supporting the order. The Third Party had the right to deny service of the interim order since there was non-compliance with Order 28 rule 14 (1) of the CPR, 2017 when the interim order was being served on it. However, the Third Party accepted service of the interim order and proceeded to file a response despite the Enforcement Creditor's failure to serve the interim order with documents that were filed in support of the same. The Third Party delayed to raise the issue pertaining to irregularity since it had already taken a step by filing a response-see Order 2 rule 4 (a) of CPR, 2017.

Nevertheless, the court finds that the Enforcement Creditor's failure to serve documents accompanying the interim order on the Third Party is an irregularity that can be cured by Order 2 of CPR, 2017. In order to ensure that the Enforcement Creditor's Lawyers do not persist with non-compliance of Order 28 rule 14 (1) of CPR, 2017, the Third Party should always check if the interim order has been served together with accompanying documents. The Third Party shall be at liberty to deny service if the rule in question has not been complied with. The Enforcement Creditor should, therefore, always ensure that all documents filed in support of an interim third party debt order have been served on all the parties requiring such service.

Finding

The third party debt order seeks to enforce the judgment against the Enforcement Debtor. The Third Party indicated that the Enforcement Debtor's account has a credit balance to satisfy part of the judgment debt. The court, therefore, finds it unfair to make an order that the Third Party should release the money to the Enforcement Debtor when the latter always waits for court orders to pay the debt. The Enforcement Debtor has never filed anything since commencement of the matter nor has it ever attended proceedings in this matter. Considering that the irregularity can be cured by Order 2 of the CPR, 2017 the Court proceeds to make a final third party debt order against the Third Party in the sum of MK24,472,000.00.

Costs shall be in the cause.

Delivered in Chambers this 8th day of September, 2022 at High Court Commercial Division, Blantyre Registry.



E. Mvula

Assistant Registrar

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