IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 525 OF 1993

BETWEEN:

ROBRAY LIMITED ..... PLAINTIFF

and

HASCO LIMITED ..... DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Msiska, Counsel for the Plaintiff
Gonaulinji, Counsel for the Defendant

O R D E R

This is an application by Hasco Cash 'N' Carry, a firm, to set aside a judgment in default of notice of intention to defend. The application is suppoted by an affidavit sworn by Mr. Gonaulinji, legal practitioner for Hasco Cash 'N' Carry. I should reproduce paragraph 10 of the affidavit because it is the turning point of my order of August 24 dismissing the application.

> "That I am further informed that Hasco Limited are entirely two different business organisations. The defendant intends to contend at the trial that Hasco Cash 'N' Carry is not a limited company."

This deposition immediately raises the locus standi of Hasco Cash 'N' Carry to apply to set aside this judgment. The action was commenced against Hasco Limited, a Limited company, on 28th April, 1993. The judgment in default of notice of intention obtained on 28th May 1993 was against Hasco Limited. The warrant of execution was issued against Hasco Limited. Hasco Cash 'N' Carry a frim, has no locus standi to set aside a judgment against a limited company.

I have always understood the law to be that people with no locus standi cannot apply to set aside judgment under the now Order 13, Rule 9. This is a general rule. Order 13, Rule 9, however, does not specify who can apply:

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> "Without prejudice to Rule 7 (3) and (4) the court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

In practice courts have allowed third parties to apply to avert substancial injustice:

> "Where substancial injustices would otherwise result, the court has, in their Lordship's opinion, an inherent power to set aside its own judgment of condemnation so as to let in bona fide claims by parties who have not in fact been heard, and who have had no opportunity of appearing. This power is discretionary, and should not be exercised except where there would be substancial injustice if the decree in question were allowed to stand, and where the application for relief has been promptly made."

(per Parker, L.J. in The Bolivar (1916)2 A.C. 203, 205). The locus standi will be established where a third party proves an interest in the judgment being set aside (Sedgwick, Collins & Co. vs. Rossia Insurance Company (1926)1 K.B.1, affirmed in the House of Lords sub nom. Employers Liability Assessment Corp. vs. Sedgwick Collins & Company (1927) A.C. 95.

In this case it is difficult to ascertain the interest of Hasco Cash 'N' Carry. Mr. Gonaulinji, in the course of the argument, alluded to the fact that a Sheriff Officer has actually seized the property of Hasco Cash 'N' Carry instead of Hasco Limited. The way to proceed is not to set aside the default judgment against Hasco Limited which in every way cannot be faulted. This would be prejudicial to the plaintiff who, for all intents and purposes, has a valid judgment against Hasco Limited except that a sheriff officer seized the wrong goods. The way to proceed would be for Hasco Cash 'N' Carry to put a notice of claim to the goods to the sheriff so that the sheriff can interplead. Hasco Cash 'N' Carry have no interest in the action between the plaintiff and Hasco Limited save that the goods Hasco Cash have 'N'carry been wrongly seized by the sheriff.

Apart from this the application has not been made properly. If Hasco Cash 'N' Carry had an interest, the application should have been made in the name of the defendant, Hasco Limited, with the latters leave, or the plaintiff and defendant should have been parties to the application and the applicant ask for leave to intervene.In Murfin vs. Ashbridge & Martin (1941), All E.R. 231, 233, Sir Wilfred Greene, M.R., said:

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> "Cathwaite had no locus standi at all to make the application, and it ought to have been dealt with accordingly. If the solicitor for Martin had thought that, for some reason or other, some useful purpose would be served by endeavouring to get that order for substituted service set aside, it was in Martin's name that such application ought to have been made. Instead of that it was made in the name of a person who had no connection with this action whatsoever for any relevant purposes of procedure."

For this reason I found it unnecessary to consider the other points raised in the summons. I dismissed the application to set aside with costs.

Made in chambers this 24th day of August 1993.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT