IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 268 OF 1991

BETWEEN:

BLACKSON MWENEBUNGU.....PLAINTIFF

- and -

MALAWI RAILWAYS LIMITED.....DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

For the Plaintiff, Kasambala
For the Defendant, Mbendera

O R D E R

This application, which relates to costs only, comes to me in this manner. In the main action, I awarded K1,200.0 to the plaintiff for loss of dependency. The action did not proceed to trial. The defendant consented to judgment being entered as to liability and agreed to damages being assessed by this Court. This aspect is important, because it makes the turning point of this decision. The agreement, made in my presence, made no order for costs. The plaintiff applied to this Court to have the costs form part of the order of assessment. Mr Mbendera, legal practitioner for the defendant, had no objection to such an order being made. He only wanted to submit on the question whether the plaintiff should have High Court costs, since the plaintiff recovered an amount below the mark where the case would have been commenced in the High Court. I heard arguments from both Mr Mbendera and Mr Kasambala, legal practitioner for the plaintiff. The plaintiff in this action be given High Court costs.

Whether a plaintiff should be awarded High Court or Subordinate Court costs, depends on section 31 of the Courts Act.

> "(1) Where an action is commenced in the High Court which could have been commenced in a Subordinate Court then, subject to sub-section (2), the plaintiff shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the appropriate Subordinate Court.

> (2) If in any such action as aforesaid the High Court is satisfied that there was sufficient reason for bringing the action in the High Court, it may allow the costs or any part thereof on the High Court scale or any such Subordinate Court scale as it may direct."

This section was considered by the Supreme Court of Appeal in the **Trustees of Dedza Diocese v. Rocha, MSCA Civil Cause No. 3 of 1984.** That decision, followed by the Supreme Court in **Attorney General v. Magombo, MSCA Civil Cause No. 9 of 1985**, seems to have been influenced in some respect by the particular interpretation by English Courts of English Legislation. Interpretation of a statutory provision by the Supreme Court binds this Court. Both Counsel cited this case which, in some respects, betrays our own Legislation. Mr Mbendera contended that since the plaintiff has recovered less than K2,500.00, the plaintiff is entitled to Subordinate Court costs. Section 31 was cited in aid. The case of the **Trustees of Dedza Diocese v. Rocha**, in so far as it interprets the section, was referred to.

The Supreme Court of Appeal in the **Trustees of Dedza Diocese v. Rocha** applied the decision of the Court of Appeal in the United Kingdom in **Solomon v. Mulliner (1901) 1 KB.76.** The Court of Appeal in the UK decided that the words "could have been commenced in a County Court", also used in section 31 of our Courts Act, refer to an action in which the County Court has jurisdiction without regarding the amount claimed. A L Smith, M.R. said:

> "I read them as meaning, which could properly have been commenced in the County Court, both as regards the character of the action and amount really involved."

The jurisdiction of Subordinate Courts is provided under section 39 of the Courts Act:

> (1) "In exercise of their civil jurisdiction, the court of magistrates shall have jurisdiction to deal with, try and determine any civil matter whereof the amount in dispute or the value of the subject matter does not exceed - in the case of a court of a resident magistrate and the magistrate of a first grade, K2,500.00."

It is palpably apparent from this provision that the jurisdiction of a Subordinate Court does not depend on the amount actually awarded by the tribunal. The amount in dispute cannot actually refer to the actual award of the Court. If Parliament had intended it to mean the actual award made by the Court, more precise words would have been used. On reading the case of **Solomon v. Mulliner**, there could be a basis for thinking that the jurisdiction of the Court is based on what the Court has awarded at the trial.

The Master of Rolls seems to have thought so, for he did say that the jurisdiction of the County Court could only be ascertained after the award had been adjudicated by the Court. Said he, at page 83:

> "At what time is it to be ascertained whether the action is, as regards amount, proper within the jurisdiction of the County Court? Not in my opinion, at the time when the plaintiff is considering what amount he should have to claim on the writ or statement of claim, but at the time when the amount recoverable is adjudicated on by the proper tribunal or otherwise ascertained by the result. It can not depend on the amount which the plaintiff choose to claim. It is the amount whih is recovered that is material."

I must say I have extreme difficulty to think that the jurisdiction of a County Court has to be left till the Court dicides on the award. Jurisdiction has to be considered at the inception. The jurisdiction of the Court would remain uncertain until the actual award. Apart from this, even if the reasoning by the Master of Rolls is correct, according to section 39 of the Courts Act, the jurisdiction is determined by the amount in dispute, not necessarily what is actually awarded by the Court.

Lord Justice Collins, who came to the same result as the Master of Rolls, proceeded on the interpretation of the particular statute. He noted that there were two conflicting decisions:

> "Having considered the cases, I cannot reconcile the decision in **Goldhill v. Clarke** with that in **Lovejoy v. Cole**. The former decision seems clearly to have been the fact that the amount claimed by the endorsement on the writ was to be looked at in order to see whether the action was within the jurisdiction of the County Court, whereas in the latter case, although the minds of the Judges do not seem to have been very specifically addressed to the point, the decision appears necessarily to involve the result that the decision is not the amount claimed in the writ, but the amount recovered in the action. We have to choose between those decisions."

The conflict was to be resolved by interpreting the particular provision to ascertain the intention of the UK Parliament. Said he:

> "In order to make out which construction of the section is correct, it is neccesary, as My Lord has pointed out, to consider the policy of the Legislature as expressed in the previous Legislation on the subject. If we find that, previously to 1988, there was a well-ascertained policy of the

> Legislature with regard to the matter, that would manifestly afford much assistance in determining the meaning of the section."

He went on to demonstrate what was the policy of Parliament in the UK in 1888, 1959 and 1984. Said he:

> "Now we find that, prior to 1888 the object of the Legislature, as expressed in the provision of the Judicature Act which incorporates various sections of the County Court Act, 1867, appears to have been that, where a plaintiff had recovered (emphasis supplied) in an action of a class which a County Court would entertain no more than a certain sum which, if it had been claimed in the writ, would have brought the case within the jurisdiction of the County Court, he should not recover any costs in the High Court, because he had chosen to sue in that Court instead of the County Court, unless the Judge certified for, or the Court or a Judge allowed costs. Such was the intention of the Legislature at that time as authoritatively declared by the Court of Appeal in **Chatfield v. Sedgewick.**"

The equivalent of our section 31(1) and (2) is section 19(1) and (2) of the County Court Act (1959), which reads:

> "Subject to sub-sections 2 to 4 of section 29, where an action founded on contract or tort is commenced in the High Court, which could have been commenced in the County Court, the costs (if any) of the proceedings in the High Court to which the plaintiff is entitled, shall be determined in accordance with section 20.
>
> (2) Neither this section nor section 20 affects any question as to costs if it appears to the High Court that there was reasonable ground for supposing the amount recovered in respect of the plaintiff's claim to be in excess of the amount recovered in an action commenced in the County Court."

Section 20, which is referred in sub-section (1) - for convenience, I will extract sub-section (2), because it is pertinent - provides:

> "If the plaintiff in an action to which this section applies, other than one for the recovery of goods, recovers (emphasis provided) a sum less than the higher limit, he shall not be entitled to recover any more costs of the action than those to which he would have been entitled if the action had been brought in the County Court."

This sub-section clearly aligns costs on a County Court scale to the amount actually recovered or awarded by the

> Legislature with regard to the matter, that would manifestly afford much assistance in determining the meaning of the section."

He went on to demonstrate what was the policy of Parliament in the UK in 1888, 1959 and 1984. Said he:

> "Now we find that, prior to 1888 the object of the Legislature, as expressed in the provision of the Judicature Act which incorporates various sections of the County Court Act, 1867, appears to have been that, where a plaintiff had recovered (emphasis supplied) in an action of a class which a County Court would entertain no more than a certain sum which, if it had been claimed in the writ, would have brought the case within the jurisdiction of the County Court, he should not recover any costs in the High Court, because he had chosen to sue in that Court instead of the County Court, unless the Judge certified for, or the Court or a Judge allowed costs. Such was the intention of the Legislature at that time as authoritatively declared by the Court of Appeal in **Chatfield v. Sedgewick.**"

The equivalent of our section 31(1) and (2) is section 19(1) and (2) of the County Court Act (1959), which reads:

> "Subject to sub-sections 2 to 4 of section 29, where an action founded on contract or tort is commenced in the High Court, which could have been commenced in the County Court, the costs (if any) of the proceedings in the High Court to which the plaintiff is entitled, shall be determined in accordance with section 20.
>
> (2) Neither this section nor section 20 affects any question as to costs if it appears to the High Court that there was reasonable ground for supposing the amount recovered in respect of the plaintiff's claim to be in excess of the amount recovered in an action commenced in the County Court."

Section 20, which is referred in sub-section (1) - for convenience, I will extract sub-section (2), because it is pertinent - provides:

> "If the plaintiff in an action to which this section applies, other than one for the recovery of goods, recovers (emphasis provided) a sum less than the higher limit, he shall not be entitled to recover any more costs of the action than those to which he would have been entitled if the action had been brought in the County Court."

This sub-section clearly aligns costs on a County Court scale to the amount actually recovered or awarded by the

Court at the end of the trial. Our Courts Act, like it was pointed out by Skinner, C.J. in the **Trusteees of Dedza Diocese v. Rocha**, does not have an equivalent provision to section 20(2) of the County Court Act in the UK. The reasoning of A L Smith, M.R. can only be understood in the light of the policy of the Legislature in the UK as manifested by the 1984 and preceding Acts of Parliament. There, clearly where the amount actually awarded by the High Court is in the purview of the County Court, the plaintiff is entitled to no more costs than he would be entitled to in the County Court. In the absence of an equivalent clear provision in our statutes, it cannot be taken in Malawi that if the High Court awards less than what is in the jurisdiction of the Subordinate Courts, the costs would, as of necessity, be Subordinate Court costs. Yet this was said to be the case in the **Trustees of Dedza Diocese v. Rocha**:

> "The instant case was an action in tort and such could have properly commenced in the Subordinate Court and if the respondent recovered (emphasis mine) less than K2,500.00, he could not be entitled to any more costs than he would be entitled if the action had been brought in that Court."

The concept of recovery is extrapolated from section 20(2) of the County Courts Act (UK). It does not exist in our statutes. Section 31(1) provides that the plaintiff would not be entitled to more costs than he would be entitled in the Subordinate Court if he commenmces an action in the High Court which could be commenced in the Subordinate Court. When could an action be commenced in the Subordinate Court? Not when the amount recovered does not exceed K2,500.00. According to section 39, when the amount in dispute, not necessarily recovered, does not exceed K2,500.00. By using the words "in dispute" Parliament must have intended that the award of costs on a Subordinate Court scale must not turn out on the amount actually awarded. The amount could be disputed. The defendant could be asking for less. The claim c than K2,500.00. The awarding0. The award could be less because of a set-off or a counter-claim. According to our law, this would not be the reason for awarding Subordinate Court costs. It is significant that the County Court Act in UK specifically provides for this in section 15(3). The County Court Act in UK is very elaborate and one would have thought that if there was change of policy, the County Court Act is more precise. However precise, however, it is not our law. Our Legislation, particularly the Courts Act, in relation to Subordinate Courts, is greatly influenced by the English statutes. Both in the Courts Act of 1959 and its predecessor in the Nyasaland laws, the wording is "amount in dispute". It is significant that the County Court Act of the UK and our Courts Act were passed in the same year; the latter speaks of the amount claimed. Our Parliament could have adopted these words: it opted for the "amount in dispute". The jurisdiction of Subordinate Courts does not depend on the amount actually recovered; it depends

on the amount in dispute. Therefore, whether costs should be on the Subordinate Court scale does not depend on the amount actually recovered. Yet all the cases that have gone to the Supreme Court have been cases where more was claimed, or at least anticipated and an amount less than the jurisdiction of a magistrate's court was awarded.

In my opinion, according to our statute, the fact that less than the jurisdiction of the Court has been awarded by the High Court does not necessarily mean that the costs should be on a Subordinate Court scale. It is the case in UK statutes. In Malawi that less has been awarded is a circumstance that raises the exercise of the discretion under section 31(2). For, indeed, if the Court awards pretty less than the minimum set out for Subordinate Courts, it could be presumed that the case could have been commenced in the Subordinate Court. This fact, however, may not be conclusive; in certain cases it may not be known what amount is recoverable. Take, for example, where damages are to be assessed. In **Hopkins v. Rees and Kirby Ltd. (1950) 2 All E.R.352**, less was actually recovered . Glyn Jones, J. in awarding High Court costs said:

> "I find in the medical report on the plaintiff, submitted to his solicitors for the purpose of this action, a statement that his ankle has a tendency still to go over, that it is now a chronic sprain which will cause some permanent disability and that if this ankle continues to be liable to go over, he might be a danger to his workmates and run the risk of injury to himself if he continued working at heights as a steel erector. Looking at that, and no more, I am unable to say that it was quite clear, or should have been quite clear, to the plaintiff, as a reasonable man, that no judge would award more than £400.00 for that injury. For that reason, I think that High Court costs are recoverable in this case and I make the order that the plaintiff is entitled to have his costs taxed on the High Court scale."

On the other hand, it is very clear the circumstances in which the Court would exercise the discretion against the plaintiff: if in the originating process the amount claimed is less than K2,500.00. In such a case, the High court would only allow the plaintiff High Court costs if there is a sufficient reason to bring the matter to the High Court. This would also be the case where the plaintiff's evidence clearly established the liability at less than K2,500.00. The list is inexhaustible. In all the other cases the test is as was laid down by Glyn Jones, J. in **Hopkins v. Rees and Kirby Ltd:**

> "The only question for me is this: putting myself, as far as I can, in the position of the plaintiff at the time when he issued the writ, am I satisfied that it was then obvious that this was a County Court

matter, or was it an action which, when tried by one judge, rather than another, must have resulted in an award exceeding £400.00 excluding any reduction on the ground of contributory negligence?"

This test was adopted by the Supreme Court of Appeal in the **Trustees of Dedza Diocese v. Rocha.** Applying the test to the present case, it cannot be said that the plaintiff would have known that the Court would have awarded less than K2,500.00. Until the court awards damages, it is not known how much would be awarded for loss of dependency. Mr Mbendera urges that if the plaintiff's legal practitioner had checked the authorities in the United Kingdom, he would have known that the award for loss of dependency for children are very low. He argued that the sum of K1,500.00 actually awarded in this case was very high if it is compared to the awards in the UK. Mr Mbendera can only be right if awards for loss of dependency are conventional, like non-pecunious heads. They are not. In **Davies v. Powell Duffyryn Associated Collieries Ltd. (1942) A.C.601, 611**, Lord Wright said:

> "Damages are to be assessed on the reasonable expectation of pecuniary benefit or benefits reducible to money value."

At page 617 he says:

> "There is no question here of what may be called "sentimental damage", bereavement or pain and suffering; it is a hard matter of pounds, shillings and pence....."

Loss of dependency cannot be all that predictable, especially where there is no proof of earnings. The plaintiff here, therefore would not have known that he would recover less than K2,500.00. In fact, there was a claim for funeral expenses amounting to K2,000.00. I held that, that could not be paid, because there was no proof that the dependants had paid. If Counsel had been more careful, he would have checked if it had actually been paid. I hold, however, that the plaintiff would not have known what amount the Court was to give. The difficulty for him can be mesmerised from the reasoning exuded in the award. I would, therefore, award costs on a High Court scale on that score.

There is a further reason for awarding costs on a High Court scale. In this case, judgment was obtained by consent of the parties when they appeared before me. It was agreed that liability is conceded. It was agreed that damages should be assessed. In the High Court damages are normally assessed by the Registrar. It is quite obvious that the parties were proceeding on the basis that I should assess the damages. The plaintiff, if he wanted, would, at that stage, have applied to transfer, but as I have said before, he could not know that less than K2,500.00 was going

to be awarded. If the defendant so minded, he could have transferred the case to the Subordinate Court. In the Supreme Court, the **Trustees of Dedza Diocese v. Rocha** and **Attorney General v. Magombo, MSCA Civ. 9 of 1985**, were cases where the Registrar, without a sigh from the parties, was to assess the damages. The latter case followed the earlier decision of the Supreme Court. The decision there seemed to be hinged on the amount actually recovered at the end of the trial. In the **Trustees of Dedza Diocese v. Rocha**, the case of **William v. Stanley Jones and Co. ¾1926) 2 K.B.37**, also a decision of the Court of Appeal in the United Kingdom, was not cited and considered. In that case, by consent of the parties, the matter was refered to a special referee of the High Court, who awarded damages within the County Court jurisdiction. In dismissing an appeal from the Divisional Court's Order for High Court costs, there was unanimity. Lord Justice Bankes proceeded on the basis that the defendant should have applied for the case to be remitted to the County Court. Said he, at page 44:

> "The defendant appealed to the Division Court on the ground that the official referee ought not to have awarded the plaintiff costs on a High Court scale; an absurd contention, because the defendant must have applied to have the case remitted to the County Court, and it was largely owing to them that the case took to long."

Lord Justice Atkins was hesitant to hold that, because the defendant refrains from remitting the matter to the County Court, the costs should be on a High Court scale. His Lordship, however, was quick to hold the defendant liable to costs on the High Court scale on the defendant's acquiescence to have the case remitted to an official referee. Said he:

> "This deplorable state of things should have been obviated if the case had been remitted to the County Court, and the defendants, on whose suggestion a summons endorsed with the plaintiff's consent, was taken out to refer the action to an official referee, are responsible for it, and cannot complain if the official refers certified for High Court costs. I am far from saying that the mere fact that the defendant abstains from applying to remit he case to the County Court is sufficient ground for certifying costs on the High Court scale. Here, the defendants did much more, and, I think the official referee was right in certifying as he did."

There was no unanimity in the Court of Appeal on whether failure by a defendant to remit the case to the County Court entailed High Court costs. If I was to choose between the two opinions, I would, because of the law in Malawi, subscribe to Lord Justice Bankes's view. In the United Kingdom, whether Subordinary or High court costs may be

awarded, depends on the amount actually recovered. It does not matter whether the case is remitted to a County Court, because the High Court will award Subordinate Court costs anyway. In Malawi, it is quite clear from the Courts Act that the Supreme Court, in the **Trustees of Dedza Diocese v. Rocha**, that the question does not turn out on what was actually awarded by the Court. Both parties must be vigilant to save costs. At an early stage the possibility of transfer must be considered. The court will, as a matter of course, consider the question of transfer at the summons for directions. In the exercise of the jurisdiction under section 31(2), the High Court must regard the question whether proceedings could not have been transferred by the defendant to save costs. The reason why the defendant in this case did not transfer the case to the Subordinate Court could very well be that he also was not sure that an award of less than K2,500.00 would be made. It is significant that the UK County Court Act (1984) provides for this in section 19(3). The fact that the defendant resists a transfer to the County Court, will determine the question.

Even if I have not adopted Lord Justice Bankes's view, the defendant in this case is caught by the other aspect of Lord Justice Atkin's view. When the parties appeared before me they agreed that I should assess the damages. Surely, if the defendant felt that less should be awarded, and I am more inclined to think that the defendant was not so minded, he should not have acquiesced to my assessing the damages. So that, even if the fact that a defendant does not apply to transfer the case to a County Court is not a reason for awarding High Court costs; the defendant, in the words of Lord Justice Atkin, "did much more", in that he allowed me to assess the damages. On that score, I would award costs on the High Court scale.

MADE this 30th day of June 1992, in Chambers.

D F Mwaungulu
REGISTRAR