

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 1553 OF 1994**

**BETWEEN :**

BISHOP PHEKANI ..... PLAINTIFF

-and-

MOSES PHEKANI (DECEASED) ..... DEFENDANT

**CORAM : CHIMASULA PHIRI, J.**

T.N. Nyirenda of Counsel for the plaintiff

A.R. Osman, Senior Counsel for the defendant

Mrs Matekenya - Official Interpreter

**RULING**

The plaintiff has applied to this Court for an order that two court records be introduced as part of the evidence in this matter. The records are MSCA Civil Appeal No. 4 of 1984 being an appeal against the decision of the High Court in Civil Cause Bo. 430 of 1982 between **M.B. Phekani vs Bazuka and Company**. The relevant pages of the record are 119 and 120 where the evidence of M.M. Phekani is recorded relating to business name for Moses Phekani and his brother Bishop Phekani. The other is MSCA Civil Cause No. 491 of 1981 between **Bazuka and Company vs M.B. Phekani and Sons** the relevant pages are 29, 49, 50, 90, 108, 109, 110, 114 and the judgment of Banda J as he then was.

Mr Nyirenda has submitted that the general rule is that an admission can be given in evidence against a party giving it and not any other party. He quoted **Halsbury's Laws of England**, Third Edition Volume 15 paragraph 537 for the proposition that when a party sues or is sued personally, any admission which he has previously made, even in a representative capacity is evidence against him. The particular form in which an admission was made does not generally affect its admissibility. Generally any document which a party has signed or otherwise recognised, adopted or acted upon, may be tendered against him as an admission. **Vide: Evans Merthyr Tydfil Urban Council (1889) 1 Ch. 241 CA.** Moses Phekani gave evidence in the two High Court cases. No doubt that in both cases he was emphatic that in the name M.B. Phekani, M. Stands for Moses, B is Bishop, his brother. He disputed that B is his nephew. Moses Phekani said that he was running a business.

In the alternative, Mr Nyirenda submitted that should the Court hold that Moses Phekani did not make any admissions, the same should be regarded as declarations against interest where Moses Phekani declared that he was not alone in the business but with his brother Bishop Phekani. Mr Nyirenda argued that Fachi as Legal practitioner for Moses Phekani was an agent and when submission amendment to name was made and ordered by the court, the same was made on behalf of Moses Phekani. Mr Nyirenda also submitted an admissibility of judgment. He referred to paragraphs 705, 706 and 708 of **Halsburys Laws of England**, Third Edition, Volume 15. He said that a judgment is evidence if it relates directly to an issue decided on. Mr Nyirenda states that the plaintiff is not a stranger since he is part of the M.B. Phekani and Sons.

Mr Nyirenda closed his submissions moving the court to admit the record of proceedings and the judgments therein.

Mr Osman opposed the application. Firstly Senior Counsel indicated that the defendant died in 1999 and the declaration if any would be hearsay and this cannot be accepted under any of the exceptions. He relies on paragraphs 533 and 535 of **Halsbury's Laws of England**, Third Edition, Volume 15. Mr Osman argued that consideration of the record of proceedings and judgment should be focused in the context of what the deceased defendant said. Secondly what the submissions of his lawyer was and lastly, the admissibility of the judgments. Mr Osman submitted that since the deceased is dead the record of proceedings cannot be admitted and the Court should bear and confine itself to the circumstances under which the admission was made.

Furthermore, when Moses Phekani made those statements, he was not an agent of Bishop Phekani. I have carefully considered this argument and with respect to senior counsel I would not accept his submissions. It is clear that when Moses Phekani made such statements he was under oath to tell the court the truth. There is nothing to show that Moses Phekani was under duress or suffering from infirmity of the mind as to diminish his appreciation of these statements in his own **viva voce** evidence. If that be the case, despite his demise, the action is continuing against his personal representatives and these should effectively challenge these statements if any. I would not say that these statements in the proceedings in question are hearsay. I would order that the statements of Moses Phekani in those proceedings be admitted in evidence.

The next issue taken by Mr Osman relates to submissions of counsel particularly in MSCA Civil Appeal No 5 of 1984 at pages 108 and 109. The submission of Mr Osman is that these can not be admitted in evidence against Moses Phekani. The argument is that these are statements of a third party. This a plausible argument. However, it has some natural flaw. The statements in the submissions of counsel for Mr Moses Phekani were made after counsel laid a thorough foundation in answer and question session. The circumstance is clearly that the submission of counsel is made on behalf of Moses

Phekani based on answers/replies of the said Moses Phekani. I would have no justification to exclude those submissions.

The submission of senior counsel on judgment is that it should not be admitted. He stated that judgment binds the parties to the suit and strangers cannot derive any benefit or assume any obligation thereunder.

I agree with senior counsel. However in the matter at hand there are two points worth noting. Firstly the business style known as M.B. Phekani and Sons enjoined Moses and Bishop and it cannot be accepted that Bishop was a third party. His name was enjoined in the proceedings. Secondly, the issue of enjoining these names and the judgment thereon was not **obiter dictum**. Therefore such judgment is admissible in evidence and I so order.

It is the ruling of this Court that the record of proceedings and judgments referred to should be admitted in evidence in this matter and be marked as exhibits for the plaintiff accordingly.

**MADE IN CHAMBERS** this 1st day of March 2000 at Blantyre.

**CHIMASULA PHIRI**  
**JUDGE**