



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO 401 OF 2016

BETWEEN:

GLOBE ELECTRONICS LIMITED 1ST APPLICANT

MOHAMED ABDUL GAFFAR KASSAM 2No PLAINTIFF

-AND-

DIRECTOR OF ANTI-CORRUPTION BUREAU DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. L. Gondwe, of Counsel, for the Plaintiffs

Messrs Nyasulu and Khunga, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

The Plaintiffs commenced the present case by way of expedited originating summons seeking determination of the following two issues:

- "1. Whether the intended purported criminal proceedings in the Chief Resident Magistrates' Court sitting at Blantyre viewed objectively, be permanently stayed for being an abuse of prosecutorial powers of the Defendant, abuse of the Court, frivolous and vexatious"*
- 2. Whether the Defendant should bear the costs of these proceedings. "*

The Plaintiffs also seeks the following declarations, orders and reliefs:



- "1. A Declaration that the criminal proceedings in the Court below are an abuse of prosecutorial powers of the Defendant; abuse of the process of the court; frivolous and vexatious.
2. An Order granting permanent stay of prosecution of the 2nd Plaintiff in the Court below;
3. An Order directing the Defendants to write a letter to the Plaintiff's business or indeed to the partners, associates, investor, counterparts whole wide world [to whom it may concern] clearing the Plaintiffs from all wrong-doing and from criminal allegations in the Court below.
4. An order that the Defendant be condemned to pay costs of these proceedings;
5. Further or other relief; and
6. And that all necessary and consequential orders and declarations and directions be given."

The originating summons is supported by an affidavit sworn by the 2nd Plaintiff [hereinafter referred to as the "Affidavit"]. The Affidavit is a lengthy one but as it is crucial to the determination of the case before me, it is necessary that I set out the substantive part thereof in full:

"2. *Plaintiffs' Business Dealings with Toyota Malawi Limited*

- 2.1 *The Plaintiffs have had business dealings with Toyota Malawi Limited [TMAL] for a long time.*
- 2.2 *The Plaintiffs received word from **TMAL** that they were selling motor vehicles to **MDF**.*
- 2.3 ***MDF** wanted the said vehicles fitted with radios. **TMAL** had to fit those radios.*
- 2.4 *By or around August 26, 2014 the Plaintiffs were authorised dealers for Harris Corporation, RF Communications Division. There is now produced and shown to me marked **MAGK 1** a copy of letter to that effect.*
- 2.5 *MDF gave specifications to **TMAL**. **TMAL** passed on the said radio specifications to the Plaintiffs. The Plaintiffs never dealt directly with **MDF** There is now produced and shown to me marked **MAGK 2** email from **MDF** to **TMAL** forwarded to the 2nd Plaintiff by **TMAL** complete with specifications.*
- 2.6 *The Plaintiffs offered to supply the radios to **TMAL** as such authorised dealer. They obtained quotations from Harris. There is now produced and shown to me marked **MAGK 3** a copy of the said quotation complete with terms and conditions.*

2.7 Later **TMAL** advised the Plaintiffs that **MDF** had changed its mind. Instead of radios they needed batteries and base chargers. The Plaintiffs ordered these. There are now produced and shown to me marked **MAGK 4** copy of email of July 3, 2014 complete with specifications of batteries and base chargers.

3. **Delivery to MDF**

3.1 The Plaintiffs duly delivered the batteries to **MDF** on behalf of **TMAL** on August 25, 2014. There is now produced and shown to me marked **MAGK 5** a copy of delivery note to that effect.

3.2 The Plaintiffs delivered the chargers to **MDF** on behalf of **TMAL** on February 10, 2015. There is now produced and shown to me marked **MAGK 6** a copy of delivery note to that effect.

4. **Payment by TMAL not MDF**

4.1 After delivery to **MDF** the Plaintiffs invoiced **TMAL**. They did not invoice **MDF** There is now produced and shown to me marked **MAGK 7** a copy of the surtax invoice.

4.2 There were even overpayments in this regard by **TMAL** to the Plaintiffs. The Plaintiffs have since squared their accounts with **TMAL**. There are now produced and marked **MAGK 8A**, **MAGK 8B** and **MAGK 8C** copies of correspondence between the Plaintiffs and **TMAL**.

4.3 Clearly, there was no single transaction between the Plaintiffs and **MDF**

5. **Defendant Prosecutes the Applicant**

5.1 Pursuant to section 83 of the Criminal Procedure and Evidence Code, the Defendant filed a complaint before the Court below. There is now produced and shown to me marked **MAGK 9** a copy of said complaint.

5.2 The Defendant also filed a charge sheet and caused issuance of warrant for the arrest of the 2nd Plaintiff. There is now produced and shown to me marked **MAGK 10** a copy of the said warrant of arrest complete with charges.

6. **High Court Cancels Warrant of Arrest**

6.1 The 2nd Plaintiff moved the High Court for Judicial Review of the prosecutorial decision of the Defendant.

6.2 The judicial Review was settled by the mutual consent of the parties. There is now produced and shown to me marked **MAGK 11** a copy of the Consent Order settling the Judicial Review around June 20, 2016.

- 6.3 *Since then the Defendant has taken no steps to prosecute the matter in the Court below.*
- 6.4 *The Plaintiffs Lawyers have written the Defendant demanding disclosure of evidence. The Defendant has yet to provide these disclosures to the Plaintiffs. There is now produced and shown to me marked MAGK 12 a copy of letter dated September 26, 2016 to that effect.*
7. *Prejudice, Loss and Damage to the Plaintiffs*
- 7.1 *The warrant of arrest for the 2nd Plaintiff generated quite some stir in society. Newspapers of daily and weekly circulation carried stories of the Plaintiffs being involved underhand, criminal dealings popularly referred to as cash gate. There are now produced and shown to me marked MAGK 13 a bundle of copies of such reports.*
- 7.2 *The corporate image of the 1st Plaintiff and the personal reputation of the 2nd Plaintiff have been hugely eroded beyond recognition. The criminal allegations have put the Plaintiff in public odium. The corporate and social revulsion or condemnation against the Plaintiffs is unprecedented.*
- 7.3 *Business associates, partners and counterparts of the Plaintiffs are now avoiding to do business with the Plaintiffs. One such business partner is Computron from the United Arab Emirates. The other one is Apple from South Africa. There is now produced and shown to me marked MAGK 14 a copy of letter from Apple to that effect."*

The Defendant contests the originating summons on matters of law only, having not filed any affidavit in opposition. Both parties filed their skeleton arguments to buttress their respective positions. However, for reasons that will become apparent in a moment, it is not necessary to recite in detail the legal arguments invoked by either side.

The present action is said to be brought under Order 28 of the Rules of the Supreme Court (RSC). It will be recalled that, prior to the commencement of the present action, the 2nd Plaintiff had moved the Court in Judicial Review Case No. 45 of 2016 (The State v. The Director of the Anti-Corruption Ex- parte Moham med Abdul Gaffar Kassam and Richard Tedwillie Makondi) for judicial review of:

- "1. The decision of the Respondent made on or around 21 March, 2016 directing or ordering the arrest and prosecution of the Applicants (hereinafter referred to as the 'the Decision ') and in connection with the supply and delivery of motor vehicle communication equipment to the Malawi Defence Force [MDF].*

2. *The decision of the circumstances where it is discriminatory and tainted with bad faith and unconscionable and therefore Wednesbury unreasonable in an open and democratic society. "*

It is crystal clear that the legal questions raised in Judicial Review Case No. 45 of 2016 are, to all intents and purposes, the same as those in respect of which the Plaintiffs now seek the Court's determination by way of originating summons. It is not contested at all that if the allegations set out in the originating summons and the Affidavit are true, the Plaintiffs would have had a remedy obtainable by the procedure of an application for judicial review under Order 53 of the RSC. That this matter is one falling under the purview of Order 53 of the RSC is borne out by the Plaintiffs' ultimate submission, in paragraph 5.1 of the Plaintiff s Skeletal Arguments, that:

"the criminal proceedings in the court below are frivolous and vexatious. They are merited in bad faith, irrationality and are clearly total and absolute abuse of the process of the Court" - Emphasis by underlining supplied

In light of the foregoing, it is clear to my mind that the Plaintiffs seek to establish that the challenged decision infringes rights which are entitled to protection under public law. Protection of such rights has, as a general rule, to be pursued by way of judicial review. In the premises, I have to pause here, as a matter of prudence, to address what to my mind now constitutes the threshold question, namely, whether or not this Court can entertain this action which has been brought by way of an ordinary action begun by originating summons when it ought to have been instituted in terms of Order 53 of the RSC?

The leading authority on this question is no doubt the case of **O'Reilly v. Mackman [1983] 2 AC 237**. The sole issue in **O'Reilly v. Mackman** was whether the court could grant declaratory relief in ordinary actions begun by writ or originating summons at the instance of prisoners disputing the validity of punishments awarded by a board of prisons visitors. The plaintiffs were four inmates of Hull Prison, who sued (three by writ and one by originating summons) for declarations that the visitors' awards were void for breach of the prison rules and for violation of natural justice. They chose the ordinary forms of action because they expected substantial disputes on questions of fact and wanted to be sure that they could call oral evidence. The House of Lords held that, in view of Order 53 of the RSC, the only available procedure in such a case, since it was a matter of public law, was application for judicial review. The proceedings were, accordingly, struck out as an abuse of the process of the court.

In the present case, the parties are agreed that the essential facts are to a great extent not in dispute. I, therefore, do not understand why the Plaintiff opted to change

from judicial review process under Order 53 of RSC to ordinary action process under Order 29 of the RSC. In the absence of a plausible explanation, I am very much inclined to the view that the present action is a blatant attempt by the Plaintiffs to evade the protections for the Defendant for which Order 53 provides. In the premises, the Originating Summons that the Plaintiffs took out herein is dismissed with costs for being an abuse of court process.

Pronounced in Court this 25th day of November 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE