



MALAWI JUDICIARY

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 29OF 2017**

**BETWEEN:**

**SHAIBU NDEKETA**

**(ON BEHALF OF NDEKETA FAMILY).....PLAINTIFF**

**AND**

**ABIBA SHABANI.....1<sup>ST</sup> DEFENDANT**

**IBADI MULI.....2<sup>ND</sup> DEFENDANT**

**SALAMATUI BULA INJESI.....3<sup>RD</sup> DEFENDANT**

**ATIKA MUHAMMAD.....4<sup>TH</sup> DEFENDANT**

**CORAM: THE HON JUSTICE H.S.B. POTANI**

**Mr. M'bwana, Counsel for the Plaintiff**

**Mr. Mbeta, Counsel for the Defendants**

**Mr. Mathanda, Court Clerk**



## RULING

On January 24, 2017, the plaintiff commenced this action against the defendants claiming damages for trespass to land, conversion and an interlocutory injunction restraining the defendants from encroaching, disposing of or taking possession of any piece of customary land belonging to the plaintiff and members of the Ndeketa family.

On the very day the action was commenced, the plaintiff made an *ex parte* application for an injunction restraining the defendants from encroaching, taking possession or disposing of the plaintiff's customary land situated at Mwalabu village in the area of Sub T/A Amidu in Balaka district until the hearing of the *inter partes* summons or determination of the matter by the court. The court declined to grant the *ex parte* injunction sought and ordered that the application be heard *inter partes* and to that end, the hearing was set for February 9, 2015.

In readiness for the hearing scheduled for February 9, the parties, in compliance with the court's direction made when the *inter partes* hearing was ordered, filed and served all necessary processes. On the part of the defendants, they also filed a ***Notice of Preliminary Application to Dismiss the Plaintiff's Action for Abuse of Court Process*** pursuant to Order 18 rule 19 of the Rules of the Supreme Court and the Court's Inherent Jurisdiction.

When the court convened, counsel for the plaintiff raised an objection to the hearing of the defendant's preliminary application on the ground that the same was not made by summons as required by Order 32 rule 1 of the Rules of the Supreme Court which requires that every application made in chambers must be made by summons and not by a mere notice as the defendants did. It is the contention of counsel that the

route taken by the defendants cannot be cured as such the application should only be heard once it has been properly made by a summons.

In response to the objection, Mr. Mbeta for the defendants argued that what Order 32 rule 1 prescribes does not apply to an application made within another application, that is, an application that has to be determined before another application already before the court can be heard. According to Mr. Mbeta, Order 32 rule 1 applies in cases of standalone applications, that is, applications independent of any other application already before the court.

The court has considered the different positions taken by counsel on the matter in issue and the backing up arguments. It is the view of the court that the issue at hand can easily be resolved and needs not to unnecessarily stall the progress of the proceedings. The court would tend to go along with counsel for the defendants that the requirement for a summons to be taken out on an application in chambers as provided for under Order 32 rule 1 relates to stand alone applications and not applications seeking determination before another application already before can be dealt with. Indeed, a practice has evolved whereby such applications are made by notice alerting the other party that at the hearing of its application already before the court, the court will be moved to hear the other side's preliminary application. In case the court's stand is faulty, it is the considered view of the court even if the route taken by the defendants were irregular, it would be cured by Order 2 rule 1 of the rules of the Supreme Court. This provision is well known and it is as follows:

*Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity*



*and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

What is most significant to note in this case is that the notice of Preliminary Application filed by the defendants clearly spells out in detail the grounds of the application and is even supported by an affidavit so much so that the plaintiff was made fully aware of substance of the defendants' preliminary application and therefore cannot be said to have suffered any prejudice on account of a summons not been taken. In the end result, the court is inclined to dismiss the plaintiff's objection and so it is ordered.

The plaintiff's objection having been abortive, it is directed that the court will hear arguments on the defendants' preliminary objection on Tuesday, February 21, 2017, at 9.00 am. The plaintiff to file and serve processes in response to the preliminary application by 4.00 pm on Friday, February 17, 2017.

**Made this day of February 14, 2017, at Blantyre in the Republic of Malawi.**



**H.S.B POTANI  
JUDGE**