



**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**BLANTYRE REGISTRY**

**Commercial Cause No. 226 of 2020**

**BETWEEN**

ZAKIR MUSSA.....CLAIMANT

**AND**

MOHOMED MUSSA.....1<sup>ST</sup> DEFENDANT

MOSHIN MUSSA.....2<sup>ND</sup> DEFENDANT

MUSSA NURHAMOMED.....3<sup>RD</sup> DEFENDANT

PHAZI INDUSTRIES LIMITED.....4<sup>TH</sup> DEFENDANT

Coram: **Manda, J**

Matumbi for the Claimant

Gondwe for the Defendants

M. Kachimanga Court Clerk/Interpreter

**RULING**

This is an application for security for costs by the second defendant, the claimant opposed the application. The brief facts of this case are that the claimant commenced this matter on the 24<sup>th</sup> of July 2020, claiming the sum of USD1, 327, 900. 00 and compound interest on the stated sum. The claimant also claimed for a refund of transportation costs, legal fees and indemnity of collection

charges. At that time, the matter was before Justice Katsala (as he then was) and the claim was against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

On the 2<sup>nd</sup> of September, 2020, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a mediation bundle and on 23<sup>rd</sup> of September, 2020, the matter was set down for mediation which was scheduled for the 6<sup>th</sup> of November, 2020. It is not clear as to what happened with the mediation, however on the 4<sup>th</sup> of December, 2020 a default judgment was entered against the 4<sup>th</sup> defendant, Phazi Industries. I must state though that going through the record, I did not see at what point that the 4<sup>th</sup> defendant was added to the proceedings. However, going by the Ruling of Justice Msungama of the 29<sup>th</sup> of April, 2021, it would seem that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were added to the proceedings by amendment of the statement of case, which was found to be irregular. Just to state that following the default judgment, there was a third party debt order and then a sale and seizure order. These were eventually stayed and the default judgment was set aside.

Further, on the 30<sup>th</sup> of September, 2020, the 1<sup>st</sup> and 2<sup>nd</sup> defendants had filed an application for security for costs again it is now known what happened to that application. Suffice it to say that on the 9<sup>th</sup> of March, 2021, the claimant filed an application for summary judgment, now against the 1<sup>st</sup> and 2<sup>nd</sup> defendants which application was dismissed. This was done by Justice Msungama in his ruling dated 29<sup>th</sup> of April, 2021. By the same ruling, Justice Msungama did also set down the matter for mediation. The mediation was eventually terminated.

This was not all, on the 21<sup>st</sup> of July, 2021, the claimant filed an application for permission to add defendant and to amend the statement of case by substitution. This application was brought under O. 10 r. 1, as read with O. 6 r. 5 and O. 7 r. 23 of the Civil Procedure Rules. The defendants opposed the application.

In that application, the claimant sought to add Zubair O. G. Issa as the 5<sup>th</sup> defendant to the proceedings on the basis that (and this is according to the Sworn statement of Bruno Paul Matumbi)

*“4. As part of the process by which the claimant facilitated the transfer of the funds under the Agreement, the proposed 5<sup>th</sup> defendant played the role of ensuring that the money was made available to the intended debtors being the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in this claim*

*5. The proposed 5<sup>th</sup> defendant are namely; Zubair Osman Gani Issa, who was the first in line receiver of funds and who then had to remit the same to the rest of the 1<sup>st</sup>-4<sup>th</sup> defendants now denies ever receiving the money and at the same time the proposed 5<sup>th</sup> Defendant has also refused to present a full account to the claimant... ..”*

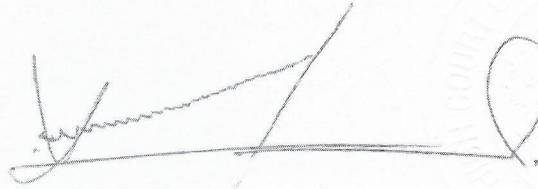
From the above paragraphs, the claimant is clearly stating that the intended 5<sup>th</sup> defendant never played his role of making money available to the 4 defendants. Simply put, the claimant is making the assertion that the 4 defendants never got the money because the intended 5<sup>th</sup> defendant denied receiving money from him. The question then is why is the claimant suing the 4 defendants? On this note I must agree with the observations of Justice Msungama (in his ruling of 10<sup>th</sup> September, 2021) that the claimant is being uncertain and inconsistent by making an additional or alternative claim against Zubair O.G. Issa. Having myself gone through the file, I do agree with the sentiments of my Brother Judge that the claimant is uncertain and inconsistent to the point of contradiction. Suffice to say that Justice Msungama dismissed the claimant's application with costs.

It is to be accepted that a litigant has to be given his day in court. That is a matter of his right. However, it is also the duty of the court to guard against its abuse and not to entertain frivolous and vexatious claims or actions. Uncertainty in terms of who to sue is a clear indication of a frivolous and vexatious action. I would thus opine that asking for security for costs when it comes to such actions, cannot be considered to be stifling the action. This is especially in the context of this matter which has now been going on for almost three years without any real headway. Further, as noted by my Brother, for a transaction of the magnitude that the claimant is asserting, there seems to be no proof (in terms of fiscal documents) that the alleged funds were transferred from the UK to Malawi.

From the foregoing and having considered the court record as it now stands, and further considering that the claimant is resident outside the jurisdiction, I must find that the application for security for costs is well grounded and I do proceed to grant the same. Clearly the claimant is not in a position to pay the costs should be called upon to do. After all it has not been disputed that he is impecunious! It also stands to doubt as to whether it is the actions of the 4 defendants that caused the claimant's impecuniosity since by the claimant's sworn statement, the person who was supposed to have transferred the alleged sums to the defendants, is denying that he received the alleged money! It is on this footing that I order and direct that the claimant should furnish the

security for costs as prayed for by the defendants and that the same should be done within 14 days of this order.

Made in Chambers this.....29<sup>th</sup> .....day of.....November.....2023

A handwritten signature in black ink, appearing to be 'K.T. Manda', written over a faint circular stamp. The signature is stylized with a long horizontal stroke and a loop at the end.

K.T. MANDA

**JUDGE**