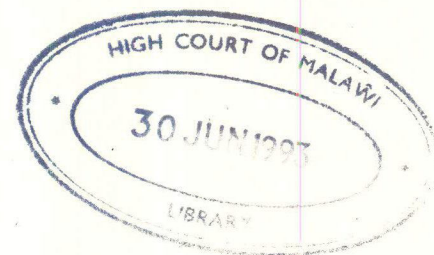


IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.475 OF 1984



BETWEEN:

R.D. GANATRA LIMITED ..... PLAINTIFF

and

J. MKANDAWIRE (FEMALE) ..... CLAIMANT

and

A.S. MKANDAWIRE (MALE) ..... DEFENDANT

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Coram: MBALAME, J.

Fachi, Counsel for the Plaintiff  
Maulidi, Counsel for the Claimant  
Chizumila, Counsel for the Defendant  
Kalimbuka, Law Clerk  
Phiri, Court Reporter

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R U L I N G

This is an application by the plaintiff in this case R. D. Ganatra Limited for an order to file a supplementary affidavit of documents in a Sheriff's interpleader. The application is strongly opposed by the claimant who is represented by Mr. Maulidi of Savjani and Company and the defendant who is represented by Mr. Chizumila of A.R. Osman and Company.

Mr. Fachi who appears for the plaintiff has filed an affidavit in support of the application in which he has deposed that an affidavit sworn by the defendant in the case of Mpasa Store vs A.S. Mkandawire, High Court Civil Cause No.389 of 1984, in which the defendant claimed or conceded being the owner of Limbika Store was on 15th August, 1986 brought to the notice of his client. In addition to this affidavit are two letters dated 12th May, 1984 and 18th January, 1985 which similarly only came to Mr. Fachi's notice on the 19th of August, 1986. He claims his client was unaware of these three documents when he filed his list of documents on 22nd October, 1985 and therefore prays that an order be made by this court allowing him to file a supplementary affidavit of documents containing these three documents. The application is made under O.24/3/5 of the Supreme Court Practice Rules and O.20/5-8/6 and 11.







Both Mr. Maulidi and Mr. Chizumila have taken up common objections to the application. They contend that since the defendant, A.S. Mkandawire, is not a party to these proceedings therefore the additional documents the plaintiff is seeking to introduce are irrelevant to the proceedings. They contend he is not a party to the proceedings because he was not mentioned in the Order for directions of the learned Registrar of the High Court dated 23rd September, 1985 paragraph 4 and 5 of which were in the following terms:

- "4. plaintiff to be defendant
- 5. defendant to be plaintiff."

It is probably important to mention that the plaintiff in that Order for directions was R.D. Ganatra Ltd., the defendant A.S. Mkandawire and his wife the claimant. The order made no mention of what was to happen to Mr. A. S. Mkandawire and suffice to say the cause number has been the same from the day the writ of summons by R.D. Ganatra Ltd. was filed up to date. The Sheriff's list of documents filed on 20th November, 1985 bore the same parties as in the original application. On 27th January, 1986 Messrs Savjani and Company entered an appearance for the claimant and again acknowledged the three parties as the parties to the action. On 22nd April, 1986 there was an application by the plaintiff to dismiss the claimant's claim for failing to comply with the Order for directions of 23rd September, 1985 and again the same three parties to the action were on the summons.

Further, on 22nd April, 1986 Mr. Maulidi himself filed an affidavit of documents which again bore the names of the three parties with R.D. Ganatra Ltd. as the plaintiff, Mr. Mkandawire as defendant and his wife as the claimant yet this was long after the alleged order for directions. Then came Mr. Chizumila of Messers A.R. Osman and Company who, on 30th January, 1986, again long after the said order for directions, entered an appearance for Mr. A. S. Mkandawire. The parties listed on the notice of appointment are Ganatra as plaintiff and A.S. Mkandawire as defendant and the cause number is the same as that of the interpleader proceedings. Attached to that notice is an affidavit sworn by Mr. Mkandawire paragraph 2 which reads as follows:

"That I have read an affidavit sworn by Mr. Vasant Ganatra on behalf of the judgment creditor and filed with the court on 20th August, 1985.

"3) that in reply to the same I state as follows:..."





The affidavit of 20th August, 1985 sworn by Mr. Ganatra on behalf of the plaintiff was an affidavit in opposition to an application by the claimant claiming ownership of Limbika Store in the interpleader proceedings. The claimant's affidavit is dated 8th August, 1985.

If Mr. Mkandawire was not party to the proceedings how then did Mr. Chizumila of A.R. Osman and Company enter an appearance on his behalf and attach an affidavit in reply to Mr. Ganatra's affidavit dated 30th January, 1986 long after the order for directions. The various subsequent documents filed by both Messers A.R. Osman and Company and Savjani and Company on behalf of their clients acknowledge the fact that the defendant, Mr. Mkandawire, is still a party to the proceedings. Is it now proper for Mr. Maulidi and Mr. Chizumila to contend that he is not? I do not think it is open to common sense and fairness to say that the defendant is not a party to these proceedings. I find that he still is and I so hold.

Mention was made of the case of Kahova vs Madanitsa High Court Civil Cause No.40 of 1980. The two counsel have submitted that the original defendant in that case was not a party in the interpleader proceedings. With respect one only has to look at the judgment of Makuta C.J. to disprove learned counsel. It should be borne in mind that in that case the order for directions was similar to the one in question in this case.

Mr. Chizumila has further submitted that O.24/7/1 of the Rules of the Supreme Court is to the effect that an affidavit of documents is conclusive subject to the two exceptions therein and none of which covers the present situation. With respect to counsel, O.24 rule 7 properly read and understood deals with the application by one party against another for an order for discovery of particular documents. The rule is as follows:

" - (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time, been, in his possession."

The two exceptions he has referred to this court also deal with the situation where one party to an action requires the other party to file an additional or supplementary affidavit of documents. With respect to counsel I do not see the relevance of that Order to the case at hand as the plaintiff here is seeking to amend his own affidavit of documents.





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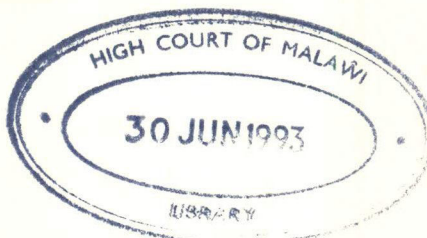
Mr. Chizumila has further referred to this Court O.24 rule 5. He submits that the plaintiff has not complied with the provisions of rule 5 of that Order in that he has not filed an amended list of the documents he proposes to bring in as prescribed by Forms 26 and 27 of Appendix A of the Rules of the Supreme Court Practice. Again with respect O.24 rule 5 deals with "the form of the list and affidavit" to be filed for purposes of discovery in accordance with rule 2 of that Order. It has, in my judgment, got nothing to do with an amendment of one's own list as such. I would wish to believe that this submission is misconceived. I cannot accept it.

Mr. Maulidi has submitted that if the application is granted his client, the claimant, will be disadvantaged in that she will be deemed to admit that the three proposed documents are original documents and that they were printed, written, signed or executed as they purport respectively to have been and that any document so described therein as a copy is a true copy. He has referred to this Court O.27 rule 4 to support this argument. This, however, is not the end of the story for paragraph (2) of that rule which is subject to paragraph (1) is to the effect that his client will still have twenty one days to dispute the contents of the new list. I do not see the necessity of this objection and I overrule it.

Order 20 deals with amendment of pleadings and other documents. Order 20 rule 8 in particular deals with the amendment of other documents not being pleadings as is the case at hand. According to paragraph (1) of that rule:

"For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."


I realise that the powers of the Court, although very wide should not, in my opinion, be used wantonly, caution should be exercised to ensure that no injustice is occasioned by any party to the proceedings. Indeed, in my judgment, a Court should not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago, and then not asked for. On the other hand this Court has the task of deciding the rights of the parties and not to punish them for getting evidence at a later stage when such



was no fault of theirs and especially when the opposing party was aware of such evidence and deliberately concealed it. As Bowen L.J. said in the case of Copper vs Smith (1883) 26 Ch.D. 700 pages 710-711, these courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. In the instant case allowing the amendment will not lead to a decision of the real matter in controversy but will assist in arriving at one.

I have had occasion to look at the document in question in addition to Mr. Fachi's affidavit. In my judgment it is essential that the plaintiff amends as prayed in order to be able to argue his case. I do not see any injustice likely to arise to any of the parties from the amendment. I allow the application as it will, in my judgment, assist the Court to decide the issue justly.

PRONOUNCED in open Court this 26th day of August, 1986 at Blantyre.

  
R. P. Mbalame  
JUDGE