IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 361 OF 1987

BETWEEN:

F.S. OSMAN ..... PLAINTIFF

- and -

MOBILE MOTORS LTD. ..... DEFENDANT

CORAM: THE HON. THE CHIEF JUSTICE
Chizumila, Counsel for the Appellant
Msiska, Counsel for the Respondent
Kadyakale, Law Clerk

JUDGMENT

This is an appeal from the Registrar's ruling on the summons for judgment on admission. The admission was contained in a letter dated 30th April, 1987 from the defendants to the plaintiff in that the plaintiff is entitled to K5,158.65. This is not denied but the defendants submitted that judgment should not be entered because this amount was credited in Civil Cause No. 241/87 which is another case between the parties. The Registrar observed that in Civil Cause No. 241/87 what was credited by way of terminal benefit was K4,732.63 leaving a balance of K426.02. He therefore entered judgment in favour of the defendants in the sum of K426.02. It was his view that it would be wrong to enter judgment for the plaintiff because he, the plaintiff, would benefit twice over.

The grounds of appeal are as follows:

1) The learned Registrar erred in concluding that because credit had been given in the sum of K4,732.42 in Civil Cause No. 241 of 1987 the judgment could not be entered on admission as this was tantamount to the Registrar giving judgment for the plaintiff to the extent of K4,732.42 when the plaintiff as defendant in Civil Cause No. 241/87 denies owing anything to the defendant as plaintiff in that Civil Cause.

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2) The learned Registrar erred in ignoring the fact that the so called credit was given only after the plaintiff had commenced the present action and for the sole purpose of delaying or defeating or frustrating the plaintiff just claim.

Mr. Msiska for the defendant has observed that what is claimed against Mr. Osman in Civil Cause No. 241 of 1987 is K53,604.32. He has therefore submitted, in effect, that the credit was given by way of set-off. He has further submitted that since the defendants have a higher claim in Civil Cause No. 241 of 1987 the Registrar erred in entering judgment in the sum of K426.02. In his view the judgment was given as if no credit had been given in respect of that amount and this was because the Registrar misconstrued 0.27/3/4 by narrowing its provisions to situations where credit has been given only to a particular amount. The provisions, according to him, are wider and include where there is a counterclaim. It was also submitted that before entering judgment on submission there must be clear admission of facts. In the present case the admission contained in the letter of 30th April, 1987 was qualified.

In dealing with judgment on admissions the jurisdiction of the Court is discretionary which, of course, is exercised judicially. So far as the clarity of facts to be admitted is concerned, I have examined the letter of 30th April, 1987. The heading is "Termination of Employment". It mentions the tax liability and the net amount due to the plaintiff. The credit which is purported to have been given is based on the letter. I am wondering how credit can be given if there is some doubt. In my view there is no ambiguity.

So far as set-off and counterclaim are concerned, it was submitted that Civil Cause No. 241/87 should be regarded as counterclaim. It was stated that 0.27/3/4 does not provide that there must be a counterclaim which must be admitted before judgment is refused. It is enough if there is counterclaim going to trial which, it was urged, is the situation in the present case. A look at 0.15/2 of the Rules of the Supreme Court reveals that a defendant in any action who alleges that he has any claim or is entitled to a relief or remedy against the plaintiff may instead of bringing a separate action, make a counterclaim in respect of that matter and where he does so he must add the counter-claim to his defence. 0.15/2/3 states that a counterclaim is made when it is properly formulated and pleaded. But the service or filing of a "Notice of Counterclaim" without any previous pleading is not a proceeding directed or recognised by the rules and does not constitute the 'making' of a

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counterclaim. Nor does a statement to the plaintiff of an intention to make a counterclaim amount to the making within the rules. The principle enunciated in these rules applies to set-off.

I have exaimined the pleadings in this case and I see no defence and counterclaim and it would be wrong, in my view, to regard pleadings in Civil Cause No. 241/87 as set-off or counterclaim. These are separate actions and they have not been consolidated. To accede to what is being proposed would, in my opinion, amount to abuse of Court. In any case, I have grave doubts as to whether they can be consolidated since two Legal Houses are involved. It is observed that Messrs Lilley Wills and Company are representing the plaintiff in this case and Messrs A.R. Osman and Company are representing the defendants in Civil Cause No. 241/87.

On Ground 1 of the appeal, I have already held that the two actions are separate. There is no counterclaim or set-off pleaded in the present action. It is therefore wrong, in my view, to credit this case with an amount which is being disputed and is awaiting proof. I agree with Mr. Chizumila's submission that this can only be resolved upon hearing evidence in Court otherwise it would amount to giving judgment before the action in Cause No. 241/87 is tried.

On the reasons given above I allow the appeal and I enter judgment in the sum of K5,158.65. The defendants will pay costs of this action.

PRONOUNCED in Chambers on 28th day of March, 1988

F.L. Makuta
CHIEF JUSTICE