

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.628 OF 1987



BETWEEN:

NATIONAL BANK OF MALAWI.....PLAINTIFF

- and -

KULANDA SOMANJE & OTHERS.....DEFENDANTS

Coram:

UNYOLO, J.

Msaka of Counsel for the Applicant  
Chatsika of Counsel for the Respondent  
Kadyakale, Law Clerk

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RULING

This is an application on the part of one Elizabeth Somanje, hereinafter referred to as "the applicant", to vacate an injunction order made by the Court on 29th February, 1988.

The pertinent facts can be stated briefly. By a writ of summons dated 16th October, 1987 and statement of claim served therewith the plaintiff pleaded that they had been appointed Executor in a Will executed by the late Mr. Sydney Benson Somanje who died in Blantyre on 9th August, 1987. The plaintiff pleaded that the said Will was duly executed by the deceased on 2nd September, 1980 and that thereafter the same was sent by Messrs. Sacranie, Gow and Company (Legal Practitioners for the deceased) in a sealed envelope to the National Bank of Malawi, Trustee Department, for safe-keeping but that the said Will was however never received by the said Bank and has since missed. The plaintiff pleaded further that the Defendants in this case who were the beneficiaries in the said Will, had instructed the Administrator General to obtain letters of administration in respect of the deceased's estate. Finally the plaintiff pleaded that the contents of the lost Will were however contained in a copy of the same and by the writ of summons herein the plaintiff's prayer was that the said copy be pronounced solemn and valid and that the Court should thereupon proceed to decree probate of the lost Will as contained in the copy hereinbefore mentionend.

In their long and elaborate defence the defendants denied that the deceased ever appointed the plaintiff Executor of the alleged Will. The defendants further challenged the authenticity of the said Will. They pleaded that as a matter of fact the deceased died intestate.



Not long after serving the defence the defendants applied for an interlocutory injunction to restrain the applicant from what was inter alia referred to as "wasting the assets" of the estate of the deceased and receiving additional assets of the said estate and holding the same to her own use. It was also sought to restrain the applicant from occupying the premises at Kwenengwe, Bvumbwe, which form part of the estate and that she should vacate the same. And finally the defendants sought an order of the Court that the Administrator General be appointed Trustee of the estate until all legal processes in the matter had been concluded. After hearing counsel in the matter the Court granted the injunction as prayed. This is the injunction which forms the subject of the present application. The applicant prays that the same be vacated on the grounds, first, that she was not, and is not, a party to the proceedings in the main action and that the original Will has now been traced in consequence of which both the proceedings in the main action and the interlocutory injunction granted herein have no basis now and are obsolete.

I will take the first point first. Mr. Msaka, counsel for the Applicant, contended that on the facts obtaining in this matter the applicant is simply the widow of the deceased and could only be made a party in the proceedings here, if the defendants are so minded to make here, through the Third Party Notice procedure laid down under O.16/1 of the Rules of the Supreme Court. Put briefly this order provides that where in any action a defendant who has given notice of intention to defend claims against any person not already a party to the action any relief or remedy or requires that any question or issue relating to or connected with the original subject matter of the action should be determined then he must issue a third party notice and that upon service of such notice the person concerned becomes a party to the action. Mr. Chatsika, counsel for the defendants, argued on the other hand that the applicant cannot honestly be heard to say that she is not a party to the proceedings in this case considering the direct interest she has in the matter and considering further that the National Bank of Malawi (the plaintiff, that is) actually instituted the proceedings here on her behalf.

As I understand the procedural law a party to a cause or matter must be a party named or cited in such cause or matter. In the context of a civil action by parties we would be talking of a party clearly named and designated as such. We would, for example, have a plaintiff and a defendant as in the majority of civil cases. But we could also have a petitioner, a respondent, a co-respondent and a party-cited as in divorce cases. And in terms of O.16 cited by Mr. Msaka we would there have a plaintiff, a defendant and a third party as parties to the action. In appeals too parties are clearly named or cited as appellant and respondent. And where a party is acting on behalf of someone else, for example, as a Receiver/Manager, Trustee or Guardian then the proceedings are appropriately titled and the names of the persons in respect of whom such proceedings are instituted are clearly stated. All this is elementary stuff to the lawyer and I merely mention it since it is pertinent to the issues in dispute in this application.

From the available facts I find that the parties in this action are the National Bank of Malawi as Plaintiff, on the one hand, and Kulanda Somanje and the thirteen other persons named in the pleadings, on the other, as Defendants. There is no other party. I find, in other words, that the applicant is not and has not been a party to the action. And I



find further, both under O.16 hereinbefore mentioned and O.29, which deals with injunctions, that it was irregular and untenable for the defendants to obtain the interlocutory injunction herein against the applicant without making her a party to the proceedings in the first place. In my view this could have been done through, as already indicated, the third party procedure laid down under O.16 or the provisions of O.15/6/2 or O.15/6/6 which allow in proper cases the adding in an action of plaintiffs or defendants as appropriate. Alternatively, fresh proceedings could perhaps be instituted by the defendants as plaintiffs against the applicant as a defendant. An injunction would then be sought against her in the usual manner in accordance with the provisions of O.29.

I now turn to the second point. Here I can say at once that I find very little merit in the argument put forward by Mr. Msaka. The proceedings in this action cannot become obsolete when the plaintiff has not applied for a discontinuance or withdrawal in the matter. I reject the argument on this aspect.

To sum up I find the applicant is not and has never been a party to the action in the present case within the meaning of the law. I find further that a party to an action cannot properly proceed to seek a remedy in the action against a person who is not already a party to such action unless such person is made a party to the action in the first place. In the premises I find that the injunction order made by the Court against the applicant on 29th February, 1988 was irregularly obtained and it is my order that the same be vacated forthwith.

Pronounced in Chambers this 1st day of July, 1988 at Blantyre.

  
L.E. Unyolo  
JUDGE

