

27-01-1991

Handwritten signature/initials

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 72 OF 1990

BETWEEN:

EDWARD LUNGU PLAINTIFF

and

A S ALIMAHOMED DEFENDANT

Coram: D F Mwaungulu, Acting Registrar
Chizumila, of counsel for the Plaintiff



RULING

This is an application under Order 14, Rule 5 of the Rules of the Supreme Court for summary judgment on a counterclaim. The plaintiff did not appear on the date of hearing of the summons. Nevertheless, on reading the affidavit in support on hearing the legal practitioner for the defendant and looking at the pleadings I give unconditional leave to the defendant to defend the action.

Order 14, Rule 5 which gives power to the Court to enter summary judgment on a counterclaim is in furtherance of the notion to equate the rules to apply mutatis mutandis to a counterclaim. I would on the same token hold that the principles applicable when a plaintiff applies for summary judgment where there is a counterclaim by the defendant would apply. In such a case the Court, where the defendant sets up a bona fide counterclaim arising out of the same subject matter as the action, and connected with the grounds of defence, the order is for unconditional leave to defend even if the defendant admits the whole or part of the claim (Morgan and Son Ltd. vs. Martins Johnson & Co. (1949)1 K.B. 107, Court vs. Sheen (1891)7 T.L.R. 556. Lord Justice Cotton said in Zoedone Co. vs. Barrett (1882)26 S.J. 657 that although a counterclaim is a cross-claim for purposes of Order 14 it is a defence. These principles, and I find no reason why they should not, should apply mutatis mutandis to an application by the defendant for summary judgment on a counterclaim where there is a main action by the plaintiff which is not frivolous, vexatious a sham or uncontestably bad. It has not been suggested that the parent action is such.

Apart from that I think the affidavit in support of the application read against the pleadings raises matters which

2/.....

would vitiate the Bill of Sale. What I understand from the pleadings and the affidavit is that I think the affidavit in support of the application read against the pleadings raises matters which would vitiate the Bill of sale. What I understand from the pleadings and the affidavit is that the defendant wanted to sell the motor vehicle the subject matter of the action, to the plaintiff. The defendant paid K7,000. He could not pay the K18,000. The K18,000 was covered by the bill of sale. This money was not received by the plaintiff at all. The Bill of Sale however says this was the case. There were no advances of money to the defendant. On the facts of this case it seems that the car was delivered and the bill was taken to secure the payment of the price. This would appear is impermissible. The learned authors of Halsbury Laws of England, 4th Edn. Butterworths, say at page 283 of Volume 4:

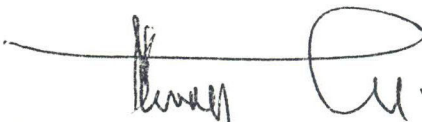
"Every bill of sale by way of security made or given in consideration of any sum under £30 is void. This provision would seem to preclude a consideration which is purely non-monetary, such as delivery of goods under a contract of sale, the seller taking a bill of sale to secure payment of the price."

The authority cited is the exchange between counsel in London and Province Discount Company vs. Jones (1914)1 K.B. 147, 148. In this case the car was delivered under a contract of sale and the bill was as taken to receive the price. In any case the bill would be infringing the statutory requirement that the consideration must be truly stated in the bill. I think there are issues which ought to be tried.

I give unconditional leave to defend. The plaintiff should take out a summons for directions.

The defendant can appeal against the Order to a Judge in Chambers.

Made in chambers this 27th day of January 1991.



D F Mwaungulu
ACTING REGISTRAR OF THE HIGH COURT

