

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 596 OF 1989



BETWEEN:

N R SENGU PLAINTIFF

and

JAYSON MAINTENANCE LIMITED DEFENDANT

CORAM: JANE MAYEMU ANSAH (MRS), ACTING DEPUTY REGISTRAR
Chatsika, counsel for the Plaintiff
Chikopa, Counsel for the Defendant

R U L I N G .

This is an application made under Order 18, Rule 19 and Order 15, Rule 6 of the Rules of Supreme Court. The plaintiff's application is that the plaintiff's action be struck out or that the defendant cease to be a party to the proceedings. The application is supported by an affidavit.

Mr. Chikopa, counsel for the defendant argued that the plaintiff's action should be struck off on the ground that the defendant is the wrong party. The plaintiff is a Limited Company which was incorporated under the Companies Act. It was incorporated on 11th June 1987. The matter referred to in this case took place in the month of March 1984, when the defendant was not in existence. Mr. Chatsika, counsel for the plaintiff opposed the application on the grounds that the Court has power to strike out pleadings if they do not disclose the cause of action, and that the case has gone to trial, and the Honourable Judge adjourned the case so that amendments could be effected. Further, Mr. Chatsika argued that the defendant inherited the properties of Jayson Maintenance Limited.

It is clear that Order 15, Rule 6 was designed to save or cure action rather than to destroy it. The objective is that all parties to an action or dispute relating to one subject matter before a court should be brought and determined at the same time to avoid delays, expense and inconvenience of separate trials. However, in the case of Kendall vs Hamiltar, Attorney General vs. Pouty Pridd Water Works Company 1908 I ch, the Court held that Order 15, Rule 6 does not alter the legal principal regarding parties to actions. Correct parties are still necessary and important for determining the point at issue in an action.

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It is common knowledge that the defendant company came in to existence in 1984. It is clear that this rule does not apply if at the date of the writ the party was non-existent Lazaro Bromers and Company vs. Midland Bank (1933) A C the Hon. Lord Wright had this to say:

"In the present case if the defendants can not be before the Court, because there is in law no such person, I think by parity of reasoning the Court must refuse to treat these proceedings as other than a nullity."

In this case action, the statement of claim reveals a reasonable cause of action but the defendant was non-existent at the time the alleged breach of contract took place therefore the defendant being non-existent could not have been in a position to have any obligation, let alone breaching it.

Order 18, Rule 19 provides that an application to dismiss an action can be made at any time, even after the pleadings are closed, however in the case of Cross vs. Earl Howe (1893) 62 6. J.Ch 342 the Honourable Judge disallowed such application after the action had been set down for trial. In the case at hand, the case is before a Judge and it is partly heard. I therefore, do not have jurisdiction to hear such application which should be made before a Judge. I disallow the application and it is dismissed with costs.

Made in Chambers this 16th day of April 1992, at Blantyre.


Jame Mayemu Ansah (Mrs)
ACTING DEPUTY REGISTRAR