

14-10-94



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 222 OF 1993



BETWEEN: B NATHVANI & K A. M. PHIRI.....APPELLANTS

- and -

UNION BANK OF SWAZILAND.....RESPONDENT

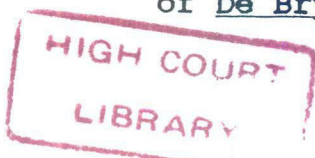
CORAM: CHIMASULA PHIRI, J
Kasambala, of counsel for the appellants
Dokali of counsel for the respondent
Sindi, Official Interpreter

R U L I N G

This is an appeal against the order of the Registrar made on 12th July, 1994 dismissing an application by the 2nd defendant for an order of security for costs made under order 23 of the Rules of the Supreme Court. The appeal is made on two grounds namely that the learned Registrar misdirected himself on point of law and fact in holding that the defendants were supposed and failed to disclose special facts necessitating the grant of the order of costs; and that the 2nd plaintiff was the owner of the vehicle in question.

It is trite law that the appeal is by way of re-hearing of the summons although not word for word. Counsel for the appellant strongly submitted that the second plaintiff is ordinarily resident outside the jurisdiction of this court and has no assets whatsoever in this country. He contended that before the application for security of costs was made a letter had been written by his firm to the 2nd plaintiff to provide such security for costs but the 2nd plaintiff has not obliged. Counsel submitted that this was a sufficient basis for the court to exercise its judicial discretion in favour of the 2nd defendant.

Counsel for the 2nd plaintiff contended that the learned Registrar did not err either in law or fact by holding that the absence of special circumstances was fatal to the application for security for costs. Mr. Dokali strongly contended that the 2nd defendant's main reason for the application for security of costs was simply that the 2nd plaintiff is ordinarily resident outside the jurisdiction of this court. He submitted that there must be special circumstances showing that it may no longer be practicable to enforce judgment of the court. He cited the case of De Bry vs. Fitzgerald (1990) ALL E. R 560 as authority for



this proposition. Furthermore counsel cited the case of Berkly Administration vs. McClelland (1990) All E.R 958 for the same proposition that residence abroad or outside jurisdiction is not per se a reason for requiring security for costs but merely confers jurisdiction. This jurisdiction is exercisable only where there are reasons to believe that the defendant would have a real difficulty in enforcing an order for costs.

In the present case it is an undisputed fact that the 2nd plaintiff is an institution ordinarily operating outside the jurisdiction of this court and having no assets in Malawi. It has not been denied by the 2nd plaintiff that it was requested by the 2nd defendant to provide security for costs.

The court has discretionary power to order security for costs. In exercising its discretion under Order 23 Rule 1 (1) the court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff, but only if the court thinks it just to order such security in the circumstances of the case. A major matter for consideration is the likelihood of the plaintiff succeeding. If there is a strong *prima facie* presumption that the defendant will fail in his defence to the action, the court may refuse him any security for costs. It may be a denial of justice to order a plaintiff to give security for costs of a defendant who has no defence to the claim.

Counsel for the 2nd defendant has contended that the subsequent finding by the Registrar that the 2nd plaintiff was the owner of the vehicle was misguided as there is no evidence to support it. Furthermore that it cannot be said with certainty that the plaintiff has high chance of succeeding in the light of some statutory defences.

I find it as a fact that when the matter came before the Registrar the 2nd plaintiff did not file any affidavit and there was no evidence of ownership tendered. The closest the issue of ownership was alluded to is when the 2nd plaintiff was being joined as a party to this suit. With respect, I find as a fact that the issue of ownership of the vehicle has not yet been resolved. However this is not the end of the matter. I have to decide whether or not the circumstances of this case warrant me to exercise my discretion to grant or refuse the prayer for security for costs. I do appreciate that by merely being a foreign resident it does not warrant the grant of the order for security of costs. Rather consideration should be had to the probability of the plaintiff succeeding in the claim and also in the event of the defendant succeeding the practicability of the enforcement of an order for costs. It can neither be said with certainty that the 2nd plaintiff will succeed nor that the defendant will succeed. Looking at the pleadings without the evidence one would say they break even. Next question will be about the practicability of enforcement of court order on costs. If the 2nd plaintiff succeeds it would be easy to enforce the

order but the same cannot be said of the 2nd plaintiff because it has no assets in Malawi. This is where the foresight to protect a litigant against deprivation of earned legal costs arises. Therefore I find that the circumstances of this case warrant the court to exercise its judicial discretion in ordering the 2nd plaintiff to provide security for costs.

I am mindful of the fact that the order for security for costs should not be used to operate as a deterrent factor to plaintiff who has a worthwhile cause of action. The 2nd defendant has prayed that the 2nd plaintiff pays K14,100.00 as an estimated 2/3 (two thirds) of the total legal costs. Clearly, this is a mere estimate and I do not think that I am bound by these figures. Therefore I order that the 2nd plaintiff pays into court the sum of K10,000.00 cash or execute a bond in favour of the court in the like sum and deposit in Malawi within 60 days of making this order.

Therefore the appeal succeeds and the order of the Registrar is set aside and its place the above orders take effect. Costs to the appellant.

Made in chambers this 14th day of October, 1994.



G. Chimasula Phiri
ACTING JUDGE