

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 539 OF 2000

BETWEEN:

MALAWI HOUSING CORPORATION.....PLAINTIFF

-and-

CAPTAIN L. MBILIZI.....DEFENDANT

CORAM: HON. JUSTICE A.C. CHIPETA

Chisanga, of Counsel for the Plaintiff
Salima, of Counsel for the Defendant
Mankhanamba, Official Interpreter



RULING

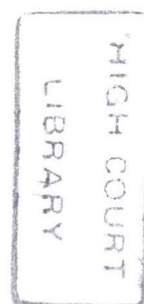
Civil Cause No. 539 of 2000 is a matter that commenced on 28th February, 2000 with issue of a Writ accompanied by a Statement of Claim. By August, 2001 pleadings between the parties in the action had been closed and on 24th August, 2001 an Order for Directions was issued in the matter. There is a bundle of pleadings to this effect filed with the Court on 1st March, 2002. The case was initially set down for hearing on 10th and 11th June, 2002.

I am unfortunately dealing with what has been labeled as a temporary file. I am not sure if it really has all the relevant papers. What I see on this file, however, is that up to bundle of pleadings stage the Legal Practitioners for the Plaintiff were M/s Chisanga and Tomoka, while those for the Defendant were M/s Kainja and Roberts. When the lawyers for the

Plaintiff took out the initial notice of hearing for the case, however, they addressed it to the Defendant, care of M/s Chagwamnjira and Company, Legal Practitioners. I guess this is where I have missed out on details that may well be on the original file. The switch from M/s Kainja and Roberts to M/s Chagwamnjira and Company as lawyers for the Defendant is not explained on the documents on the temporary file.

The day hearing was to commence, i.e. on 10th June, 2002, there is a consent judgment signed by M/s Chisanga and Tomoka on behalf of the Plaintiff and by M/s Chagwamnjira and Company on behalf of the Defendant. It is also signed by the Registrar of the High Court as issuing officer.

A number of other processes and applications have since then followed in this matter, but what is relevant for our present purposes is a document M/s Chagwamnjira and Company filed on behalf of the Defendant on 28th April, 2004. It is entitled "Originating Motion (Expedited Form)" and it seeks to set aside the Consent Judgment of 10th June, 2002, or alternatively to amend the consent judgment by excluding some four out of its five paragraphs.



When called for hearing on 11th May, 2004 a few things were amiss. Reference was made to the Defendant having filed skeleton arguments. There were none on the Court file. A copy was then furnished to me. Reference was also made to the fact that the Plaintiff had filed an affidavit in opposition. This too was not on the Court file. I was then also supplied with a copy on the spot.

At this point learned Counsel for the Plaintiff, Mr Chisanga, raised a point he asked me to determine as preliminary. On authority of Ainsworth vs Wilding [1896] 1 Ch. 673 he argued that a consent judgment is a final judgment and that it can only be set aside under a fresh action taken out for that purpose. In the instant case it was Mr Chisanga's argument that taking out an Originating Motion within the

existing action Civil Cause No. 539 of 2000 did not make it a fresh action. On this basis he contended that the Originating Motion was misconceived.

In response to this query Mr Salima, learned Counsel for the Defendant, submitted that an Originating Motion being one of the recognized originating processes in civil matters and as such always goes along with a supporting affidavit, in this case the Defendant could not be faulted. The use of the same cause number, he argued, was merely necessary for the sake of reference so as to identify from where the issues in the Originating Motion had arisen. He thus disputed the irregularity the Plaintiff attributed to this application. In the alternative Mr Salima argued that since this is a fresh action the Court could instead give directions for the matter to properly proceed to trial.

I am aware that in the High Court there are four styles of commencing civil proceedings. See Order 5 of the Rules of the Supreme Court. These modes encompass writs (05 rule 2), Originating Summons (05 rules 3 and 4), and Originating Motions, and Petitions (05 rule 5). Following the general provisions on the mode of beginning civil proceedings under Order 5 above-referred, different subsequent orders and rules amplify on how in practice parties proceed under each mode. Thus Order 6 of the Rules of the Supreme Court goes into greater detail about Writs of Summons, while Order 7 tackles Originating Summonses, as Orders 8 and 9 respectively address Originating Motions and Petitions.

Now the peculiar situation I have before me is that under one and the same cause number I have two originating processes. One party calls these as two independent actions while the other calls them as being one action only. I tend to think that the answer is simple and rather straightforward.

Civil Cause No. 539 of 2000 started with a writ between Malawi Housing Corporation as Plaintiff and Captain L. Mbilizi as Defendant. It went through all material interlocutory

stages until it became ripe for hearing. Come hearing date the parties entered with the Court a consent judgment resolving all the issues outstanding between them. Only enforcement remained and steps were being undertaken in this regard.

Four years and two months after commencement of this action, while still citing Malawi Housing Corporation as Plaintiff and Captain L. Mbilizi as the Defendant, and while carrying the same cause number, the Defendant grafted on the file what he called an Originating Motion. He wishes this to be construed as a fresh action although, save for that description, for all practical purposes the Originating Motion has been filed, not as a commencing step, but as one of the continuing steps in the action the Plaintiff took out long ago.


To begin with I think a distinction must be kept between an Originating Motion which commences an action and a motion taken out within an existing cause to address a given interlocutory matter. Now assuming in this instance the Defendant wanted to commence a fresh action, as he claims he did, to set aside or amend the consent judgment in Civil Cause No. 535 of 2000 I do not know how he would make himself the Defendant in whichever originating process he opted for. Being the person lodging the complaint in the fresh action I would expect him to be the Plaintiff/Claimant, Applicant or Petitioner. In this case the person who took out the Originating Motion described himself as the Defendant. Already this was a start on the wrong footing, I would say.

Further, if this was meant to be a fresh action I would have expected it to bear its own civil cause number. The Originating Motion having been filed in April, 2004 it was supposed to have a cause number ending with the year 2004. This one bears a year 2000 serial number of the case in which the applicant was indeed Defendant as described in the Originating Motion.

Furthermore, I find it rather difficult to accept that in one and the same registered case a Plaintiff can start its case with a writ and the Defendant can also in the same matter start his own case with an Originating Motion. This raises the question whether it is legally possible to have two originating processes in one and the same cause.

It strikes me at the end of it all that we will be engaging in fiction if we accepted that the Originating Motion herein commences a fresh action independent from the one that the Plaintiff started in the year 2000. Now fresh action was started by it and I find that it was a mistake for the Defendant to graft this Originating Motion within an existing action. If it be accepted, as the parties appear to do, that to set aside a consent judgment that is final in a matter one must bring a fresh action for that purpose as held in Ainsworth vs Wilding above-referred, then the Defendant clearly erred in bringing his application within an existing civil cause. Thus on this technical ground the Originating Motion herein must fail and I accordingly dismiss it with costs.

Made in Chambers this 21st day of July, 2004 at Blantyre.


A.C. Chipeta
JUDGE

