

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1393 OF 2001



BETWEEN:

E J MASSONA.....PLAINTIFF

- AND -

ANNA NKHOMA.....1ST DEFENDANT

CHRISTOPHER KASEMA.....2ND DEFENDANT

JESSIE KAZINGA MKANDAWIRE.....3RD DEFENDANT

THE NEW BUILDING SOCIETY4TH DEFENDANT

CORAM: HON JUSTICE M.C.C. MKANDAWIRE

_____, of Counsel for the Plaintiff
Mr Chagwamnjira, of Counsel for the Defendants
Nsomba, Official Interpreter

R U L I N G

This matter has a very long but sad history. The plaintiff, on the 29th of May, 2001, took out an originating summons seeking out a number of declarations. The record shows that whilst waiting for the hearing of the originating summons the plaintiff obtained an injunction. For more than

three years, the matter could not be heard. As can be seen from the order of Kapanda J which he delivered in October, 2004, the injunction was discharged and the matter on the originating summons was also dismissed. Reasons for the discharge and dismissal are well laid down in that ruling. After the order of the Learned Judge, the plaintiffs' counsel filed in summons for Rehearing /Restoration of the originating summons. This was filed on the 6th of January, 2005. The application was heard on the 6th of January, 2005, whereby Kamwambe J. opted for the restoration of the originating summons to the list and further ordered that the injunction which had hertherto lapsed, be restored for the next three months. It would appear that the file later on went missing at the Civil Registry. Counsel for the plaintiff therefore was unable to have a perfected order that he obtained on the 6th of January, 2005. Counsel also found it difficult to file in an application requesting the Court that the matter be proceeded with as if the matter had been commenced by way of a writ of summons so as to enable the parties to be heard viva voce. On the 5th of April, 2005, plaintiff's counsel persuaded the civil registry to open a temporary file which they did. On the 7th of Apri, 2005, the court extended the interlocutory injunction of the 6th of January, 2005.

The matter therefore came before me for an application for continuation of proceedings as if matter began by writ of summons. There is an affidavit in support of this application deponed by Counsel Joster Mwazani Chisale. There is also a supplementary affidavit in support of this application deponed by the same counsel. Counsel for the 4th dependant Mr Dick Chagwamnjira also filed in an affidavit in opposition. When the matter herein came for hearing in my Chambers on the 4th of May, 2005, the plaintiff's counsel was not present. I therefore ordered that we proceed in their absence.

The plaintiff's affidavit in support of this application discloses that the plaintiff's action is based on fraud; namely the fraudulent and unauthorized transfer of the plaintiff's interest in title No. Nyambadwe 791 by his daughter, Anna

Nkhoma the first defendant. The plaintiff therefore says that being an action on fraud, the action ought to have commenced by originating summons in the very first place. In addition, the plaintiff says that there are a lot of conflicts in the evidence requiring the parties to be heard viva voce.

The 4th defendant through their counsel have vehemently opposed this application. In the first place, they have referred this Court to the inordinate delays that this case has suffered at the hands of the plaintiff. For example, on 6 occasions, the plaintiff failed to attend hearing of the originating summons. This led to the court dismissing the matter in September, 2004. They also argue that after the matter herein was restored, the plaintiff did not prosecute the matter until the day the restoration order was to expire that is to say on the 5th day of April, 2005. That instead of prosecuting the originating summons as per the order of the Court, the plaintiff made the present application to convert the action from originating summons to writ of summons action. In their considered view, the 4th defend has already suffered a lot of injustice due to failure by the plaintiff to prosecute the matter for a period exceeding three and half years. It would therefore be oppressive at this stage to convert this matter to writ action also taking into account the plaintiff's in action and delayed prosecution. Finally, the 4th defendant submitted that an action based on fraud in the first instance but commenced by originating summons can not be converted into a writ action Under Order 28 Rule 8 of the rules of the Supreme Court unless the allegation of fraud only arose in the Course of the action. In the instance case, the plaintiff were aware of the issue of fraud from the word go on the 29th of may, 2001 as can be seen on the originating summons. They therefore pray to this court that this matter be dismissed with costs.

The basis of this application is Order 28 Rule 8 of Rules of the Supreme Court as read with Order 5 Rule 2. Order 28 Rule 8 provides that in any matter begun by originating summons, where it appears to the court that it should be

continued as if begun by writ, the court may order the proceedings to continue as if the matter had been so begun.

I have paid attention to the above Orders and my understanding is that Order 28 r 8 Rules of the Supreme Court is that if an allegation of fraud exists at the very beginning of an action, the appropriate way of instituting the action is by writ. If an originating summons was used instead, one can not have recourse to Order 28 r 8 Rules Supreme Court. If the allegation of fraud arises in the course of the proceedings, one could easily result to Order 28 r 8 Rules of the Supreme Court.

Looking at the facts of this case, it is very clear that the originating summons which did institute the present case on 29th May, 2001 made an allegation of fraud. Paragraph (a) of the originating summons reads:

"By this summons which is issued on the application of the plaintiff, Mr Erenesto Jackson Massona, seeks the following declaration from this court namely:


- (a) a declaration that the purported sale of Title Number Nyambadwe – 791 to Jessie Kazinga Mkandawire and the subsequent sale to Mrs M.A. Phiri be set aside on the ground that the same have been done fraudulently".*

This clearly shows that the plaintiff was aware of the allegation of fraud and it was misconceived at the outset that the proceedings were commenced by originating summons. The plaintiff should have followed the spirit of Order 5 rule 5 of Rules of the Supreme Court. I do not think that the plaintiff can now result to order 28 Rule 8 RSC in order to rectify the blunder. The matter is more than technical.

The court has also looked at the conduct of the plaintiff in this case. In the first place, since the matter herein started in 2001, the plaintiff failed to attend court on 6 occasions. That led to the dismissal of the

summons. After the matter herein was restored, there, was again very little activity from the plaintiff, when this application was set down for hearing on the 4th of April 2005, the plaintiff's counsel did not even bother to appear in order to personally prosecute the application. That said, I do not find any merit in the plaintiff's application. I accordingly dismiss it with costs to the 4th defendant. I therefore order that the matter herein should be given the urgency that it deserves so that the issues should come to finality.

MADE this 18th day of May, 2005 at Blantyre.



M.C.C. Mkandawire
JUDGE