

**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CASE NO. 1210 OF 2006**

BETWEEN

CEMENTATION BUILDING CONTRACTORS.....PLAINTIFF

-AND-

M/S KIMS MEDICAL CENTRE.....DEFENDANT

**CORAM:**     MANDA, **SENIOR DEPUTY REGISTRAR**

SALIMA for the Plaintiff

WADI for the defendant

**RULING**

This is the plaintiff's application for Summary Judgment taken out under Order 14 of the Rules of the Supreme Court. The plaintiff was asking the court to enter judgment for the sum of K4, 107, 602, interest in the said sum at the ruling Stanbic Bank lending rate as well as costs for the action. The application was supported by the affidavit of Mr. Lewis Simutiana, the Managing Director of the plaintiff company, at the same time counsel for the plaintiff also filed skeletal arguments. The application is opposed.

The brief background to this matter is that the defendant contracted the plaintiff to construct a shopping complex on plots number 2/633 and 634, Lilongwe, at a total cost of K67, 993, 624.00. According to the plaintiff, it was an express term of the contract that the defendant would make interim payments on all finished works upon the plaintiff submitting his invoices for the said work. In this regard it was the plaintiff's submission that he has so far raised invoices worth K4, 107, 602. 00, which the defendant has not honored hence the reason the plaintiff took out this action. In terms of the application for summary judgment, it was the plaintiff's contention that in as far as the invoices remain unpaid, the defendant cannot be said to have a defence as the same would only be done by producing evidence to show that they had honored the presented invoices.

On their part it was the defendants defence that the invoices that the plaintiff's presented to them were honored after some negotiations reducing the original values. As such the defendants denied owing the plaintiff the sum stated. Of course I should point out that the defendants never produced any documentary evidence to show that they had indeed honored the invoiced, reduced or otherwise. At the same time in their affidavit in opposition, the defendants denied that the plaintiff was entitled to be paid merely upon raising an invoice, rather it was their contention that under clause 31 of the Bills of Quantities, exhibited by the plaintiff as "CBC 1," payment for work done was only supposed to be effected to the plaintiff upon an Architect or Supervising Officer, issuing an interim certificate for purposes of ascertaining valuations. In this instance, it was the defendant's assertion that contrary to clause 31, the plaintiff himself issued the certificates and that the same were for inflated values, which values they are disputing. In addition, the defendants did raise the issue of poor workmanship, specifically in relation to the materials that the plaintiff is said to have used in constructing the roof of the shopping complex, which roof is apparently defective. Indeed, in this last regard the defendants proceeded to file a counter-claim for the replacement value of the whole roof. Having said all this, it was thus the defendant's submission that this matter raises triable issues and consequently summary judgment can not be granted.

It was also the defendant's contention that on a point of law, they should be given unconditional leave to defend this matter since they did raise a bona fide counter-claim arising out of the same subject matter and connected with the grounds of the defence. In this regard the defendant cited the case of **Morgan & Sons Ltd v Martin Johnson & Co. Ltd** [1949] 1 K.B. 107, which case was applied under Order 14/3-4/13 of the Rules of the Supreme Court. Briefly this was the basis on the defendant's opposition to this summons.

Having gone through Order 14/3-4/13, it was the view of this court that the position of the law is that the fact that the defendant raises a bona fide counter-claim on the subject matter of the action; he ought to be given unconditional leave to defend. This, it is noted, applies even in situations where the defendant admits the whole or part of the claim. Indeed it is the law that a counter-claim ought to be treated as a defence for the purposes of Order 14 (as per Cotton, L.J. in **Zoedone Co v Barrett** (1882) 26 S.J. 657). The reasoning behind this is not only to avoid multiplicity of actions but also to allow for set-off, especially in situations where the amount of the defendant's counter claim is known and is capable of being set-off by the plaintiff's claim (see **Axel Johnson Petroleum A.R. v Mineral Group A.G.** [1992] 1 W.L.R. 270). In the present instance the defendant did not state as to how much it would

cost him to replace the roof and whether indeed the same is capable of being set-off by the plaintiff's claim, but I suppose that this would also be a matter of dispute and hence not suitable for these proceedings. However, where there is no clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, and the defendant sets a plausible counter-claim for an amount not less than the plaintiff's claim, the court can proceed to enter judgment for the plaintiff with costs, with a stay of execution until the trial of the counter-claim (see **Sheppards & Co v Wilkinson & Jarvis** (1889) 6 T.L.R 13, which is applied under Order 14/3-4/13). The question is then, besides the counter-claim, (which I do believe is bona fide), is there a defence? In this instance, whilst in the defence the defendant is saying that they paid off the plaintiff, in their affidavit in opposition, there is every suggestion that the defendant is withholding the plaintiff's payment on account of the fact that there were no interim certificates issued by an Architect/Supervising Officer and that there was poor workmanship. In my view these aspects do not remove the fact that the defendant is indebted to the plaintiff and there can not be said to constitute a defence. Nevertheless, there is the question as to the extent of the indebtedness, which in the circumstances I believe can only be answered after an independent expert has had to assess the actual value of the work that was done and his findings subjected to the test of a trial.

Having said all this, it is the view of this court that there are several issues that are being raised in this matter, which I believe should be dealt with at a full trial. I thus proceed to find that the application for summary judgment fails and I do proceed to grant the defendant leave to defend this matter. Costs of these proceedings will be in the cause.

Made in Chambers this.....day of.....2007

**K.T. MANDA**  
**SENIOR DEPUTY REGISTRAR**