

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO 2382 OF 2006**

**BETWEEN:**

**LUCIA MATEGULA CHOLA .....PLAINTIFF**

**AND**

**DR NGA MTAFU.....DEFENDANT**

**CORAM: HON JUSTIC M. C. C. MKANDAWIRE**

Mr P. Chisama for the plaintiff

Mr Viva Nyimba for the defendant

Mrs Edith Malani – official interpreter

**R U L I N G**

*Mkandawire J,*

**INTRODUCTION**

This is a summons taken by the defendant to strike out the plaintiff's writ of summons and discharge interlocutory injunctions. The summons is taken pursuant to Order 18 Rule 19 and Order 29/1/17 of the Rules of the Supreme Court. There is an affidavit in support of the summons deposed by Mr Viva Nyimba, counsel for the defendant. There are also skeletal arguments filed by counsel.

The plaintiff has opposed the summons and there is an affidavit in opposition deposed by Peter Chisama of counsel. Counsel has also filed in skeletal arguments.

**The defendant's case:**

On the 21st June, 2004, the defendant commenced action against the plaintiff by originating summons. The said summons is marked as exhibit "V1". The defendant says that the said summons was served on the plaintiffs as shown on exhibit "V2". The defendant has attached an order for the interlocutory injunction which is exhibit "V3" having been obtained in his favour on 27th August, 2004. The said order for injunction was served on the plaintiff and the affidavit of service is exhibit "V4".

Later on *inter partes* summons for interlocutory injunction was filed and it is exhibit "V5". The said originating summons is and the summons for interlocutory injunction is still on the list.

The plaintiff commenced another action by way of writ of summons on the very subject matter already existing under Civil Cause No 1715 of 2004. Later the plaintiff commenced an action for injunction on the same subject matter under Civil Miscellaneous Civil Application No. 113 of 2006 and was granted interlocutory injunction *ex parte*. This is exhibit "V6".

The defendant therefore says that the plaintiff was expected to respond to the originating summons, and to summons for interlocutory injunction and exhaust the proceedings in Civil Cause No. 1715 of 2004 before commencing new proceedings on the same subject matter. The defendant therefore says that the commencement of new proceedings before the former are determined is irregular and abuse of court process. The defendant therefore prays to this court

that both the writ of summons and the *ex parte* order for interlocutory injunction be struck out and discharge or set aside respectively without requiring the defendant to plead back, and the matter proceed to hearing on the basis of the originating summons under Civil Cause No 1715 of 2004 which still exist on the list.

**The plaintiff's response:**

The plaintiffs say that they were not served with a copy of the said originating summons. What the plaintiff however received was an order of injunction marked "V3" and that this was in September 2004. The plaintiffs say that the affidavit of service "V2" is also irregular in that the Civil Cause Number thereon is 1415 of 2004 and not 1715 of 2004 as alleged by the defendant. The plaintiffs further say that there has been a lot of confusion in this matter in that the said affidavit of service cannot be relied upon as being duly served on the plaintiff. It is also deponed that there have been several disagreements on the land in dispute for example Mr Felix Herbert Masinga also sued unilaterally the defendant herein in Civil Cause No 434 of 2003 and was represented by Lawson and Company as shown in exhibit "PC". That the defendant herein plaintiff by then was serving the documents on the legal practitioners of the said Herbert Masinga, Lawson and Company but not the plaintiff herein. The plaintiffs finally say that there was no suppression of the facts stated in the affidavit in support of this application and no intention of abusing the court process. It is therefore prayed on the plaintiff's side that the matter herein should not be set aside but that it should proceed as commenced by a writ of summons under Civil Cause No 2382 of 2006 as matters in Civil Cause No 1715 of 2004 are not exhausted. It is also prayed that the interlocutory injunction filed as Miscellaneous Civil Application Number 133 of 2006 should not be discharged but should be amended to be included in Civil Cause No 2382 of 2006 submissions.

I have looked at the submissions filed by both sides. It is clear from these submissions that the court has powers to strike out pleadings on the ground that it is an abuse of the process of the court. Order 18 rule 19 of Rules of the Supreme Court is very clear on that. Order 18 rule 19/18 further does explain what an abuse of the process of the court is. This term "*an abuse of the process of court*" connotes that the process of the court must be *bonafide* and properly and

must not be abused. The court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

## **ANALYSIS OF THE FACTS AND LAW**

The contention in this case as I can discern from the facts is that the plaintiff herein issued a writ of summons after originating summons had already been issued. In other words, that the plaintiff's writ of summons is an abuse of the process of the court in that the originating summons already exists on the same manner. On the other hand, the plaintiff has said that the said originating summons was not served on them and they were not aware of it at the time the writ herein was being issue.

I have looked at the originating summons"V1". It is Civil Cause No 1715 of 2004. The affidavit of service "V2" is however referring to Civil Cause No 1415 of 2004. There is therefore a discrepancy herein between the originating summons and the affidavit of service. I have also looked at the mode of service of the said originating summons. It is clear that there was no personal service as required under Order 10 rule I of the Rules of the Supreme Court – as read with Order 65 rule 4 Rules of the Supreme Court. I also observe that taking into account the nature of the dispute herein, this was not such a matter which should have commenced by originating summons. This actually violates Order 5 rule 4 of the Rules of the Supreme Court. I therefore order that the matter commenced as Civil Cause No 1715 of 2004 under originating summons may proceed as Civil Cause No 2382 of 2006 which was commenced by writ which was the correct way of commencement. There should therefore be an amendment under Order 20 of the Rules of the Supreme Court as read with Order 18/19/1 of the Rules of the Supreme Court. I further order that there should be no discharge of the interlocutory injunction proceedings under Miscellaneous Civil Cause No. 113 of 2006, but should be amended as part of Civil Cause No 2382 of 2006. Costs to the plaintiff.

**MADE** in chambers this 13th day of October 2006 at Blantyre.

M. C. C. Mkandawire  
**JUDGE**