



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL NO. 40 OF 2007**

BETWEEN:

HUMPHREY MVULAAPPLICANT

AND

SHIRE BUSLINERESPONDENT

CORAM: HON. JUSTICE E.B. TWEA

Mr. Msuku, of the Counsel for the Respondent

Absent, of the counsel for the Applicant

Mr. Manda, Official Interpreter

RULING

Twea, J.

The applicant brought a notice of motion for determination of a preliminary point under Section 22 of the Court Act. The point was as follows:-

“Whether in the light of the applicants claim made in IRC Form 1 and the Respondents defence in IRC Form 2, and the judgment delivered by the Industrial Relations Court, the Deputy Chairperson in her sitting alone without assessors to wit without an employers’ representative and an employee’s representative was quorate or inquorate; to wit whether the provisions of Section 67 of the Labour Relations Act were complied with”

The facts of the matter were that a claim was lodged in the Industrial Relations Court which was defended, and a counterclaim was lodged. The parties then appeared before the Deputy Chairperson, sitting alone, for a hearing. The hearing was delayed, basically on account of the respondents not having or claiming not to have full instructions. When the respondent failed to proceed to cross-examine the applicant, on account of seeking instructions first on an amendment allowed the applicant, that morning, the court ordered that the matter should proceed to judgment.

There was no indication that the evidence was closed, nor did she request the parties to make submissions at that point. She did however, give the parties time to file submissions before the judgment. It is on record however, that the respondents did not file their submissions.

The respondents have since filed an appeal against the judgment. Be this as it may they filed this preliminary point. The respondent, on this notice, who was the applicant in the court below, argued that the preliminary point should have been argued together with the appeal. I ruled that the preliminary point be argued first to determine whether or not the court had jurisdiction to proceed to trial. I wish to distinguish this case from that of *Nganisho vs. Mtewa [1971-72] ALR 428*. In that case the subordinate court made a decision against which the applicant appealed. The applicant subsequently brought an application for leave to move for judicial review on account of jurisdiction. The High Court held that the application was at liberty to bring the application for leave to move for judicial review. However, it held that he should not be allowed to pursue that course of action at once. The application for leave was thus adjourned pending the determination of the appeal. In the present case however, I find that it can not be argued that here are two actions. Further, this court's decision on this preliminary point will determine whether or not the appeal should lie against the lower court judgment.

I now come back to the point in issue.

Section 67 of the Labour Relations Act provides as follows:

- “67---(1) Subject to subsection (3), a sitting of the Industrial Relations Court shall be constituted by the presence of the Chairperson or the Deputy Chairperson and

- one member from the employees panel and one member from the employers' panel, as chosen by the Chairperson.
- (2) Subject to subsection (3), the decision of a majority of the members in a sitting shall be the decision of the Industrial Relations Court.
 - (3) When the dispute involves only a question of law, a sitting of the Industrial Relations Court may be constituted by the presence of the Chairperson or Deputy Chairperson sitting alone.”

The applicant have agreed that the matter in questions involved questions of fact or facts and law. The Deputy Chairperson therefore had no jurisdiction to preside alone. The applicants relied on the case of Gilbert *M. Phiri v. Shire Bus Lines Civ. Appeal 74 of 2005* before this by very court, which was on the same point. On the other hand, the respondent have relied on the waiver by the applicant's appearance and nor raising any objection.

The issues are clear. According to Section 67 (1) of the Labour Relations Act, to constitute a court the Chairperson or Deputy Chairperson, must sit with two other members of her or his choice, one each representing the employees and employers. This is the general rule. The exception is where the decision his on points of law only, where he or she “may” sit alone. In this respect, there is discretion on the part of the Chairperson or Deputy; to sit alone or with the other two members.

In the present case the pleadings clearly show that there were matters of fact and law involved. I put very little weight on what the counsel said in court outside their pleadings. I am fortified in this because it was clear that the matter was to have a full trial on all the issues pleaded. Further, from the record of the lower court, it shows that the witness for the respondent had disputed the values of the vehicles in the counterclaim, which were matters of fact. Be this as it may, the Deputy Chairperson did not make any finding on the counter claim. In fact she made no finding on the remedies sought by the respondent or the alternatives thereto. It would appear that the lower court was greatly influenced by the fact that there was interference by the Executive branch of Government in a contractual arrangement. This concern, legitimate as it may be, should not have swayed the court to overlook the contractual arrangements between the parties. The decision should have been based on issues between the proper parties.

I find therefore, that the issues in these pleadings were on facts and law. The lower court therefore should have been constituted according to Section 67(1) of the Labour Relations Act.

The next question, I need to answer is whether the appearance of Counsel would amount to a waiver or regularize the sitting of the court? In the case of ***Bhima vs. Bhima 7 MLR 163*** the court said an agreement between the parties to a suit cannot enlarge the jurisdiction of a tribunal of limited jurisdiction and no estoppels can be raised by such an agreement. It is the duty of the court to ensure that it is properly constituted before it can assume jurisdiction over a case. The onus to do so cannot be transferred to the parties. It is not open to the court to sit irregularly and hope that the default or oversight of the parties would regularize the sitting. It is my finding therefore that a decision made by an irregular court is null and void: ***Gilbert M. Phiri (supra)***.

I therefore set aside the judgment and remit this case to the Industrial Relations Court for retrial before a competently constituted court. I make no order as to costs.

PRONOUNCED in Chambers this 13th day of June, 2008 at Blantyre.

E.B. Twea
JUDGE