JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 315 OF 2016

BETWEEN:

JAMES CHIKU KAPHALE ..... APPLICANT

MALAWI COMMUNICATIONS REGULATORY AUTHORITY ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Gondwe, of Counsel, for the Applicant
Messrs Mmeta and Mbotwa, of Counsel, for the Respondents
Mrs. A. Mpasu, Court Clerk

RULING

Kenyatta Nyirenda, J.

On 14th June 2016, the Applicant commenced an action in the Industrial Relations Court (lower court) against the Respondent to challenge his suspension from exercising his duties in his post as the Respondent's Director of Legal Services. In the documents before the lower court, the Respondent is referred to as "Malawi Communications Regulatory" and "Malawi Regulatory Authority".

The Applicant sought an interlocutory injunction against the said suspension which the lower court declined for lack of jurisdiction. On 15th June 2016, the Applicant then filed an ex-parte summons for an order of interim relief restraining the Respondent from suspending the Applicant as Director of Legal Affairs pending the hearing and determination of the substantive matter before the lower court. The Ex-parte Summons came before me on the same day and I granted the Applicant an ex-parte injunction subject to the Applicant filing an inter-partes summons within 10 days of the date thereof.

On 27th June 2016, the Respondent filed with the Court an ex-parte summons for an order to discharge the interlocutory injunction and I ordered the summons to come by way of inter-partes hearing on 1st July 2016. Two days later, the Applicant filed Notice for Leave to Amend Name of the Respondent by way of Correction [Hereinafter referred to as the "Notice"]. The Notice is couched in the following terms:

> *"NOTICE FOR LEAVE TO AMEND NAME OF THE RESPONDENT BY WAY OF CORRECTION*
> *(Order 20 Rule 8 of the Rules of the Supreme Court)*
>
> *TAKE NOTICE that the Applicant shall apply to the court before the hearing of the matter herein for Leave to Amend, the name of the party by way of correction as shown in the draft copy of the Amended Order and that all processes herein to bear the corrected name."*

The Notice is supported by an affidavit of Chancy T. Gondwe, counsel seised of the matter on behalf of the Applicant. The affidavit by Mr. Gondwe is very brief and the substantive part thereof reads as follows:

> *"3. **THAT** the Applicant commenced this action before this Court against Malawi Communications Regulatory Authority (MACRA).*
>
> *4. **THAT** in typing the of the Respondent, it has been typed differently and that in the IRC Form 1 was typed as Malawi Communications Regulatory (MACRA) and in the Order was put as Malawi Regulatory Authority but the proper name is Malawi Communications Regulatory Authority (MACRA)*
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> *5. **THAT** the alleged mistake sought to be corrected was a genuine mistake and was not misleading such as to cause any reasonable doubt as to the identity of the person intending to be sued.*
>
> *6. **THAT** this is an amendment to correct the name of the Respondent."*

The application to amend the name of the Respondent by way of correction [Hereinafter referred to as the "Application to Amend"] is opposed by the Respondent on four grounds. Firstly, Counsel Mmeta submitted that the Notice was not correctly made in that there is no O. 20, r. 18 under the Rules of the Supreme Court (RSC). Secondly, Counsel Mmeta contended that in so far as the Applicant attached a draft of an amended order of the Court, he intends to amend an order of the Court but such an amendment is expressly prohibited by O. 20, r.8 of the RSC. Counsel Mmeta argued that citation of non-existent rules of practice is fatal.

Secondly, Counsel Mmeta submitted that under O. 20 of the RSC, any application for amendments of any of the Court documents has to be on motion or summons. It was his contention that the O.20 of the RSC does not provide for an amendment by notice in the manner advanced by the Applicant.

The third ground raised by Counsel Mmeta relates to the question whether or not an amendment of a name of the Respondent can be made in the High Court when the originating process is in the IRC? It may be useful to quote the relevant part of the Respondent's Written Submissions:

> *"3.3.1 The Applicant seeks to amend the name of the Respondent as it appears on the Order of Injunction. This is erroneous as it presupposes that the originating process bears the correct name save for the Order of Injunction. To the contrary, the Originating process, namely IRC Form 1 bears a non-existent respondent in the name of Malawi Communication Regulatory.*
>
> *3.3.2 Order 20 of the Rules of the High Court does not have a singular provision for the amendment of IRC Form 1 which is a unique originating process in the IRC. IRC Form 1 cannot be amended through Order 20 of the Rules of the High Court. The IRC Form 1 can only be amended in the IRC through the appropriate rules applicable in that court. (for the avoidance of doubt, our position would have been different if the IRC Form 1 had a correct Respondent. In which case, the correction in the High Court would have been restricted to the mistake in its Order of Injunction)*
>
> *3.3.3 The said order of injunction was made on the basis of the flawed originating process which is before the industrial Relations court; however the Applicant herein has not amended the name of the Responded before the IRC. The Notice for leave should therefore be dismissed for irregularity."*

In the fourth ground, the Respondent states that the proposed amendment has the effect of adding a new party to the case at an execution stage. Counsel Mmeta invited the Court to note that the Communications Act establishes the Malawi Communications Regulatory Authority and not the Malawi Communications Regulatory. Thus, it was argued that the amendment, as prayed by the Applicant, intends to add a party to a case "which cannot be done after an order was already granted. All that remains in the present case is the execution as evidenced by the committal proceedings pursued by the Applicant herein."

Counsel Mmeta cited three cases to buttress his submissions, namely, **Davies v. Elsby Brother Ltd [1960] 3 All ER 672, Osman v. Registered Trustees of United Democratic Front, HC/PR Civil Cause No. 3307 of 2004 (unreported), Davies v. Elsby Brother Ltd [1960] 3 All ER 672** and **Muluzi and Another v.**

Malawi Electoral Commission, Constitutional Cause No. 1 of 2009 (unreported).

In **Davies v. Elsby Brother Ltd**, *supra,* the plaintiff was injured in an accident which he alleged was due to the negligence of his employers, and issued a writ against "Elsby Brothers (a firm) instead of Elsby Brothers, Ltd. The plaintiff's solicitors applied for and were granted leave to amend the writ by changing the name of the defendants from "Elsby Brothers (a firm)" to "Elsby Brothers, Ltd". On appeal it was heard that the amendment involved the addition of a new defendant, the limited company, and was not merely the correction of a misnomer, for there had been two different entities, the firm and the company, therefore, the amendment should not have been granted, since, the leave sought, to add a defendant.

In **Osman v. Registered Trustees of United Democratic Front**, supra, Kapanda J, held that a party cannot be added as a defendant for the purposes of execution only. In the case of **Muluzi and Another v. Malawi Electoral Commission**, supra, the Defendant sued in the matter was named "The Malawi Electoral commission instead of "the Electoral Commission" as established by the Constitution and the Act. The court held that in any given proceedings the court can only properly exercise its adjudicative authority over persons and bodies with capacity to sue and be sued according to Law. Names used in common parlance, when it comes to matters legal in Court, ought to give way to legal names or legally recognized names.

The submissions by Counsel Gondwe were also concise and brief. For ease of reference, the Applicant's Skeleton Arguments are set out in full:

> *"3.1 It is a guiding principle of cardinal importance on the question of amendment that, generally speaking all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" See Jenking L.J in G.L Baker Ltd Vs Medway Building & Supplies Ltd {1958} 1WLR 1216 at 1231 (1958) 3AII ER 540 @ 546.*
>
> *3.2 It is a well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights .....I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace....It seems to me that as soon as it appears that the way in which a party*

has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right" (Per Bowen L.J. in Copper v Smith (1883) 23 Ch.D 700.

3.3 *Practice Note No. 20/8/19 provides that An amendment to correct the name of a party may be allowed, even if made after the expiry of any relevant period of limitation and even if it is alleged that the effect of the amendment will be to substitute a new party, provided the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or to be sued. Rodriguez v Parker [1967] 1 QB 116.*

3.4 *An amendment to correct the name of a party may be allowed even after a final Default Judgement has been entered e.g to substitute the correct name for the incorrect name in which he was sued where it is plain that the mistake was genuine and that the Defendant knew that the Plaintiff intended to sue him as the person against whom the claim was being made. (Singh v Atombrook Ltd [1998] 1AII ER 395).*

I have carefully considered the Application to Amend and the forceful submissions made by both counsel. Much as ordinarily this Court is invariably inclined to allow an application to correct a genuine mistake as to the identity of the parties to an action, the Application to Amend is not that straight forward. Firstly, the grounds advanced by the Respondent for opposing the Application to Amend went largely unchallenged. These include the fact (a) there is no Order 20 rule 18 of RSC authorising the amendment of the Respondent's name by notice and (b) amendment under O. 20 of RSC can only be made by summons or notice of motion and not by notice.

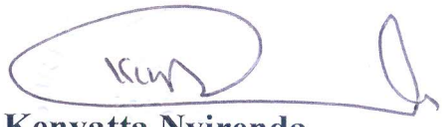
Secondly, and perhaps more importantly, it has to be borne in mind that the proceedings before this Court are ancillary or secondary to the substantive case before the lower court. In this regard, I am not persuaded by Counsel Gondwe's submission that an amendment of a name of the Respondent can be made in the High Court when the originating process is in the lower court. To my mind, it would not be legally tenable for this Court to grant the injunction in the name of a party whose name is different from the name in the originating process before the lower court.

It seems to me that in this matter the Court is not just confronted by a mere technicality. In any case, as was aptly observed by Mwaungulu J, as he then was, in **Mwazangati Khoromana v. Malifa Jambe, HC/PR Civil Appeal Cause No. 06 of 2013 (unreported)**:

> *"The procedural rules laid are not supposed to be obeyed in breach on the understanding that Judges will regard them as mere technicality. Procedural justice is not subservient to substantive justice. Most often substantive justice is hardly achieved by undermining procedural justice. Procedural justice is integral to substantive justice. Show me good justice. Show me good substantive justice and I will demonstrate to you there was procedural justice in the first place."*

All in all, it is my considered judgment that the Application to Amend cannot be maintained. In the result, the Application to Amend is dismissed with costs. I so order.

Pronounced in Chambers this 12th day of July 2016 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE