



**MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO.42 OF 2016**



**BETWEEN:**

**PAMODZI SETTLEMNT TRUST (2005).....PLAINTIFF**

**AND**

**BLANTYRE CITY ASSEMBLY.....DEFENDANT**

**CORAM: K. BANDA, ASSISTANT REGISTRAR**

Gondwe, Counsel for the plaintiff

Matumbi, Counsel for the defendant

Ngoma, Court Clerk

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**ORDER**

**Crux of the application.**

This is this court's order on plaintiff's application for disposal of a matter on a point of law under order 14A of the rules of the Supreme Court. To wit the plaintiff application is asking for disposal of the matter on the following questions;

1. Whether the defendant, by failing to deliver the billboards belonging to the plaintiff after seizing the same, did convert them to their own use; and
2. Whether the defendant in law are liable for conversion; and
3. Whether the plaintiff is entitled to damages for conversion.

**Background**

The brief background to the matter is that by a statement of claim filed on 2nd February, 2016, the plaintiff averred that it owned billboards elected at diverse places in the city of Blantyre. That around August,2015, officers of the defendant seized five of them for non-



payment of city rentals of MK5,000.00 each per month. That by notice dated 13<sup>th</sup> August,2015, the defendant informed them that they would release the billboards upon them settling the charges for all five at a price of MK5,000.00 each per month for the period from January to December,2015.

The plaintiff further alleged that a total sum of MK300,000.00 was paid on 22<sup>nd</sup> August,2015 in respect of the said period. That consequent to this payment, the plaintiff reliant on the notice that the billboards would be released upon the same, went to collect the billboards but surprisingly found only two instead of the total of five. The plaintiff therefore, alleges that having encountered this, they wrote the defendant demanding the return of the three billboards. It is their assertion that up to the date of this application, to wit, to dispose the matter on the listed points of law under order 14A, the defendant has failed to give back the billboards.

### **Order 14A applications**

Under this order, the court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings. The preliminary requirements for the court to grant the application under this order are provided in paragraphs 14A/2/3. They are as follows:

- a. The defendant must have given notice of intention to defend.
- b. The question of law or construction of a document is suitable for determination without a full a trial of the action
- c. Such determination will be final as to the entire cause or matter or any claim or issue therein.
- d. The parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.

Going further, under paragraph 14A/2/8, the application is supposed to be supported by affidavit evidence deposing to all the material facts relating to the questions of law or construction to be determined by the court.

It should also not elude our minds that for purposes of order 41 rule 5(2), proceedings under order 14A are not interlocutory proceedings. This is the case because by its nature, the application will decide the rights of the parties and will determine the action or otherwise finally dispose of it. See. para.41/5/3 and **Rossage v Rossage**[1960] 1 WLR 249.

For the fore going reasons, order 41 rule 5(1) requires that the person who is knowledgeable and able to prove the facts be the one to depose to the facts in the affidavit. Otherwise the affidavit will be rendered defective. And if this happens order 41rule 4

which essentially gives a way out by way of a defective affidavit would not assist the matters. As the only acceptance to use defective affidavit herein pertains to defect to form and not substance. The said provision is quoted and reads:

***An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form (emphasis mine) thereof.***

And further according to paragraph 41/4/1, the effect of the rule is stated as follows;

***This rule is only permissive. If the irregularity can be cured without undue hardship, or it is not a matter of substance (emphasis is mine) or affects its actual contents, then it should be put right . Any costs will fall on the solicitor responsible.***

Reverting to the application before this court and examining it in light of the requirements outlined above, the following can be deduced: There was notice of intention to defend filed by the defendant. Equally the statement of claim was served on the defendant. This satisfies the first requirements.

As to whether the question of law or construction of a document herein is suitable for determination without a full a trial of the action; and as to whether determination of the questions will be final as to the entire cause or matter or any claim or issue herein, and; indeed as to whether the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination, I should state I reserve my comment for now. I do so having noted that counsel for the defendant had, upon completion of the plaintiff's counsel address to the court, raised an issue of the affidavit filed in support of the application as being defective and therefore inadmissible. The basis was that the deponent was not the plaintiff but his counsel who cannot be able to prove the facts as deposed in the affidavit.

The court gave counsel for the plaintiff an opportunity to reply to which in response, he bemoaned the approach of bringing the application later after he had addressed the court instead of filing it as a preliminary objection days before as is normal practice. He relied on order 41 rule 4.

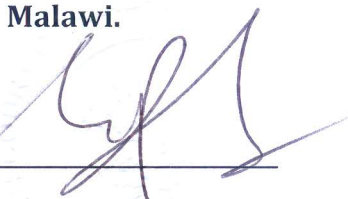
With due respect as alluded to earlier, this court is of the view that order 41 rule 4 can not be used in these circumstances. The reason being that it is not the form in issue but the substance. Again on the defective affidavit, this court agrees with counsel for the defendant. The court is mindful of the fact that the application before it was not interlocutory and hence the affidavit sworn by counsel for the plaintiff and not the plaintiff was caught by order 41 rule 5(1) of the Rules of Supreme Court to wit if this is read together with para. 14A/2/8. This view is fortified upon reference to paragraph 3 of plaintiff counsels affidavit.

As counsel rightly put it in that paragraph, counsel for the plaintiff had conceded that information he was deposing to had been passed on him by another and consequently rendering him not source and hence not one with full knowledge of the facts. In our view, he is indeed not fit to be cross examined with finality.

As a way out when counsel pleaded with the court not to dismiss the application, it was the courts view that since order 41 rule 1 cannot alter the state of affairs herein, the correct approach, and which the court did exercise was to adjourn the matter and order the plaintiffs' counsel to file a replacement affidavit within seven days of the adjournment date. To the shock of the court, counsel did not abide with the order. In consequence therefore when the matter resumed for continuity on the 19<sup>th</sup> of May,2016 , there was no communication from the plaintiffs' counsel despite him being around the chambers up to the time just before the proceedings. And so in the absence of an affidavit evidence in support of the application by way of replacement on terms ordered, the action cannot be sustained and I so grant defendants application. I dismiss the application with costs.

As to the other questions, I find it a futile exercise to pursue them the application having fallen and consequently discard them. The matter must therefore go to trial. The defendants defence and affidavit in opposition so filed are to be used. Counsel must therefore file summons for directions within 7days of this order.

**Ordered in chambers this 11<sup>th</sup> day of July, 2016 here at Blantyre in the Republic of Malawi.**



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KONDWANI BANDA  
ASSISTANT REGISTRAR