



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE NO. 119 OF 2016**



BETWEEN

LEONARD DICKSON CHIUTSI PLAINTIFF

-AND-

NATIONAL BANK OF MALAWI DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Banda, of Counsel, for the Plaintiff

Messrs Mwangomba and Mtonga, of Counsel, for the Defendant

Mr. Obert Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

This is an application by the Defendant for a transfer of this case from this Division to the Commercial Division.

The background to the application is of the simplest. The Plaintiff commenced an action on 15th September 2016 against the Defendant claiming:

- “(a) An order of injunction restraining the defendant by itself, its agents, servants, or any person whomsoever however appointed from selling, offering for sale or threatening to do so.*
- (b) An order allowing the discharge of charge of title number Michiru 95/73 granted to defendant.*
- (c) The sum of K19, 808, 00.00 in detinue with interest thereon as pleaded*
- (d) Damages for detinue and deprivation as the plaintiff would have placed the charge with other banks.*



- (e) *Damages for defamation of character, reputation, and loss of enjoyment and quite possession of the land and title to the land*
- (f) *Costs of the action.*”

On the same day, the Plaintiff filed an Ex-parte Summons for an Order of Interlocutory Injunction restraining the Defendant from selling, offering for sale or engaging itself or others in the process of valuing for purposes of sale or selling the Plaintiff’s land under title number Michiru 95/73 [hereinafter referred to as the “Plaintiff’s property”]. The interlocutory injunction was granted subject to an inter partes hearing on 18th October 2016.

Prior to the set hearing date, the Defendant filed with the Court its application for the transfer of the proceedings to Commercial Division. The application for transfer is said to be brought under O.4, r.3 of the Rules of the Supreme Court and under the Court’s inherent jurisdiction. The application is supported by an affidavit sworn by Happy Wongani Mwangomba, of Counsel. The Affidavit is very brief and the substantive part thereof will be quoted in full:

- “3. *I have carefully gone through the statement of claim as well as affidavit in support filed by the plaintiff and it is clear that the dispute in this matter arises from a banker-customer relationship.*
- 4. *According to O.1 r 5 (i) of High Court (Commercial Division) Rules 2007a banking matter or a matter arising from a banking relationship or a banking financial service is a commercial matter.*
- 5. *Therefore, in keeping with the rules I apply that an order be made for the transfer to the High Court (Commercial Division) so that it be determined there.*”

The application for transfer of the case is heavily contested by the Plaintiff and an Affidavit in Opposition, sworn by Edwin Banda, of Counsel, was filed to that effect. For purposes of parity of treatment, I will also set out in full the Plaintiff’s Affidavit in Opposition. It reads:

- “2. ***THAT*** *the action is between a banker and its customer but consists of more than two matters (at least three) in question one of which is a commercial transaction that failed to take place. I verily believe a commercial transaction that failed to take place is itself not a commercial transaction.*
- 3. ***THAT*** *I verily believe that accordingly the matter of commercial transaction that failed to take place that is in question is not a banking matter; it does not arise from a bank relationship or banking financial service.*

4. *THAT the statement of claim shows clearly that there was no banking financial service that the defendant rendered. The defendant cannot rely on its failure or alleged failure to provide a financial service to call the matter a financial service.*
5. *THAT I verily believe the High Court (General Division) is better poised to deal with the issue of a financial service that failed to take place owing to the generality of the claim and of the issues that would be brought into the claim as opposed to specialty of the claim if the banking transaction had taken place which matter is strictly a banking matter.*
6. *THAT the primary matter in this action which is and the plaintiff's claim is in detinue, and detinue is not necessarily a banking matter, nor a matter arising from a banking relationship or a banking financial service as detinue can occur between parties that are not banks or one of them is a bank.*
7. *THAT the fact that the defendant is a bank does not make detinue a banking matter in this action. The defendant is wrongly dealing with the plaintiff's land and that is the issue in this action.*
8. *THAT the High Court (General Division) has ever dealt with cases in detinue but the High Court (Commercial Division) has not and insofar as judgments from these honourable Courts are concerned and so the General Division as opposed to the Commercial Division is better poised to deal with this matter as detinue rather than as a banking matter.*
9. *THAT I accordingly weighed this matter and the claim made by the plaintiff and determined that the action be placed in the High Court (General Division) which has jurisdiction to hear and determine it, and look at areas of negligence, breach of financial agreement, breach of covenant detinue.*
10. *THAT I verily believe the application for transfer of the case by the defendant is made on a wrong premise of the law in terms of O. 1.r.5(1) High Court (Commercial Division) Rules 2007 and wrong understanding by the defendant of the facts of claim.*
11. *THAT I accordingly verily believe that transferring the case to the Commercial Division presupposes a pre-judgment that this action is based on a banking financial service and not on detinue and not even on a failure to provide financial service and that pre-judgment is made before the full facts are placed before the honourable Court and that pre-judgment will mean the plaintiff will say the Court has already concluded that the plaintiff's claim of non-existent banking relationship has failed.*
12. *WHEREFORE I pray that the application for transfer be dismissed with costs."*

The submissions by Counsel Mtonga were concise and brief. He began by contending that the statement of claim shows that the claim by the Plaintiff arises from a banking relationship. He then referred the Court to Order 1, r.5 of the High Court (Commercial Division) Rules [hereinafter referred to as the “Rules”] which gives a definition of a commercial matter. In his view, the present proceedings fall squarely within the scope of a commercial matter as defined by Order 1, r.5 of the Rules. He specifically alluded to paragraphs (i) of Order 1, r. 5 of the Rules which defines a commercial matter as being “*a civil matter of commercial significance arising out of or connected with any relationship of a commercial or business nature, whether contractual or not, including but not limited to (i) banking, negotiable instrument, international credit and similar financial services*”.

That being the case, Counsel Mtonga proceeded to contend that the provisions of Order 1, r.4 (3) of the Rules must be allowed to apply with full force. Order 1, r.4 (3) reads as follows:

“No commercial matter over which the Commercial Division has jurisdiction in terms of these rules shall be commenced in any other Court or Division of the High Court.”

To buttress his submissions, Counsel Mtonga cited the case of **Hetherwick Mbale v. Hissan Maganga, Misc Civil Appeal Cause 21 of 2013 (Unreported:1st June 2015)** as authority for the proposition that a commercial matter should be dealt with in the Commercial Division unless there are compelling reasons for doing otherwise.

The oral submissions by Counsel Banda followed very closely the “arguments” set out in the Plaintiff’s Affidavit in Opposition. He maintained his contention that, as the commercial transaction between the Plaintiff and the Defendant had failed to take place, the matter before this Court not a banking matter: “it does not arise from a bank relationship or banking financial service”. It was thus argued that the matter does not fall within Order 1, r. 5(i) of the Rules

Having considered the submissions by Counsel, I wish to start by observing that it is clear that both parties are not yet aware of the enactment of Act No. 23 of 2016, namely, the Courts (Amendment) Act, 2016 [hereinafter referred to as the “Amendment Act”]. Sections 2 and 3 of the Amendment Act are relevant. Section 2 of the Amendment Act amends section 2 of the Courts Act by inserting therein the following new definitions:

“Civil matter” means a civil matter that is not a commercial, criminal, family or probate matter”;

“commercial matter” means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including—

- (a) *The formation or governance of a business or commercial organization;*
- (b) *The contractual relationship of a business or commercial organization;*
- (c) *liabilities arising from commercial or business transactions;*
- (d) *The restructuring or payment of commercial debts;*
- (e) *The winding up of companies or bankruptcy of persons;*
- (f) *The enforcement or review of commercial arbitration award;*
- (g) *The enforcement of foreign judgments of commercial matters subject to the provisions of the law;*
- (h) *The supply or exchange of goods and services;*
- (i) *banking, negotiable instruments, international credit and similar financial services;*
- (j) *Insurance services; or*
- (k) *The operation of stock and foreign exchange markets,*

in the event of doubt as to whether a matter is commercial or not, the judge at the outset or during the course of the action, shall have power to resolve the issue”;

“Criminal matter” means a matter requiring a person to answer for an offence under any written law other than revenue law;

“Family matter” means a civil matter which concerns the entry, subsistence and exit from a marriage, and incidental matters thereto;

“Probate matter” means a civil matter which concerns succession to or inheritance of property and incidental matters;

“Revenue matter” means a civil or criminal matter which concerns taxes, duties, fees, levies, fines or other monies imposed by or collected under the written laws set out under the Malawi Revenue Authority Act.”

Section 3 of the Courts (Amendment) Act amends the Courts Act by inserting therein, immediately after section 6, section 6A which establishes, in subsection (1), five divisions of the High Court as follows:

- (a) The Civil Division which shall hear civil matters not provided for under another Division of the High Court;
- (b) The Commercial Division which shall hear any commercial matter;
- (c) The Criminal Division which shall hear any criminal matter;
- (d) The Family and Probate Division which shall hear any family or probate matter; and
- (e) The Revenue Division which shall hear any revenue matter.

Section 6A of the Courts Act also contains the following subsections:

- “(2) Where a person commences a matter or makes an application in a division other than the appropriate division in accordance with this section, the Registrar shall, on his own volition or on application, immediately transfer the matter to the appropriate division.*
- (3) Any costs arising from the process under subsection (2) shall be borne by the party who commenced the matter in an inappropriate division.”*

I have considered the grounds advanced by the Plaintiff for objecting to the transfer and I find them wanting. Counsel Banda concedes that the action is between a banker and its customer who entered into a commercial transaction: see paragraphs 2 and 3 of the Plaintiff’s Affidavit. Further, there is no denying that the Plaintiff was granted by the Defendant an overdraft facility which was secured by charging the Plaintiff’s property. The overdraft was for a sum not exceeding K19, 808,000 plus interest thereon. On the basis of the foregoing, there is no doubt in my mind that what we have here is a civil matter of commercial significance arising out of or connected with a relationship of commercial or business nature.

When considering the definition of “commercial matter”, it is important to bear in mind that paragraphs (a) to (k) inclusive merely set out a few examples of matters that fall within the phrase, which is in the chapeau of the definition, that is, *“a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not”*. As long as a civil case is of commercial significance and it arises out of or connected with any relationship of commercial or business nature, it qualifies as a civil matter

Under the Courts Act. That such a commercial transaction (a) “failed to take place, (b) is not a banking matter or (c) does not arise from a bank relationship or banking financial service is neither here nor there. Accordingly, it is my finding that the case herein is a commercial matter.

In terms of section 6A of the Courts Act, it is the Commercial Division, and not this Court (Civil Division), that is charged with hearing commercial matters. In the premises, this matter has to be transferred to the Commercial Division. I, accordingly, direct that the Plaintiff should have this case transferred to Commercial Division within 14 days hereof, failing which the action shall automatically stand dismissed and the interlocutory injunction granted herein will no longer be valid. It is so ordered.

Before resting, the Court wishes to observe that the Amendment Act goes along way to address a few questions that have vexed the legal fraternity over the last nine years, that is, whether (a) Divisions of the High Court could be established and (b) the jurisdiction of the (other Divisions of) the High Court could be whittled down by means of subsidiary legislation.

It will be recalled that Order 1, r.4 (3) of the Rules purported (the past tense is used advisedly as the Rules are no longer in operation) to confer on the Commercial Division exclusive jurisdiction over commercial matters. To my mind, being part of subsidiary legislation, the Order could not have such legal effect. In this regard, in so far as the Rules sought to limit the jurisdiction of (other Divisions of) the High Court, the Rules were misconceived and were not worth the paper they were written on. This is precisely the point the Supreme Court makes in **Liquidator of Finance Bank Ltd (in voluntary liquidation) v Kadri Ejaz Ahmed and Sheith Azizi Bhai Issa, MSCA Civil Appeal No. 39 of 2008 (Unreported)** [Hereinafter referred to as the “Aziz Case”] at page ...:

“The unlimited 1st instance jurisdiction of the High Court general division, as provided in section 108 of the Constitution, remains unaffected by Order 1 rule 4(3) and Order 1 rule 6 of the High Court (Commercial Division) Rules.

It would seem that the jurisdiction conferred by Order 1 rule 4 (3) and Order 1 rule 6 are only for the purpose of promoting good case management practice; but those rules have no capacity to oust the jurisdiction conferred on the general division of the High Court by s108 of the supreme law of the land.

...

The Court believes that the scheme of section 108 of the Constitution was to give unlimited power to every Judge of the High Court to hear and determine any case. This Court takes the position that Order 1 rule 4 (3 has a tendency to undermine the basic principle and values of our Constitution. We find that approach unacceptable.” – Emphasis by underlining supplied

It is clear from the underlined words that the issue that lay at the heart of **Aziz Case** was whether the jurisdiction of the (other Divisions of) the High Court could be whittled down by means of rules. No authority for this novel and somewhat strange proposition has been, or can be, cited. It, therefore, comes as no surprise that the Amendment Act 2016 had to be enacted to address the anomalous situation and comittant legal problems arising therefrom. Fortunately, these problems are now behind us.

Pronounced in Court this 3rd day of November 2016 at Blantyre in the Republic of Malawi.

A handwritten signature in blue ink, consisting of a large, stylized initial 'KN' followed by a long horizontal line and a small flourish at the end.

Kenyatta Nyirenda
JUDGE