



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 398 OF 2013**

**BETWEEN**

**BUSINESS FINANCE LIMITED.....PLAINTIFF**

**-AND-**

**MONOLUX PAINTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**DONNIE NKHOMA T/A NY ALA INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Kapoto, Counsel for the Plaintiff Mr. Misanjo, Counsel for the 1<sup>st</sup>  
and 2<sup>nd</sup> Defendants 2<sup>nd</sup> Defendant: Absent and unrepresented Mr. O.  
Chitatu, Court Clerk

**RULING**

***Kenyatta Nyirenda, J.***

This is this Court’s ruling on the Plaintiffs summons for leave that the action herein should proceed as if commenced by way of writ and that the parties herein be amended by replacing “Monolux Paints Limited” with “Talochan Singh Gill and Talwinder Singh Gill t/a Monolux Paints [Hereinafter referred to as the “Summons for Leave”]. The Summons for Leave is made pursuant to 0.2, r.7 and 0.5, r.4 of the Rules of the Supreme Court (RSC).

A brief outline of the background to the Summons for Leave is as follows. On 15<sup>th</sup> August 2013, the Plaintiff filed with the Court an originating summons seeking several declarations in respect of sums of money advanced by the Plaintiff to the

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2<sup>nd</sup> Defendant. By an acknowledgement of debt dated 15<sup>th</sup> June 2012, the 2<sup>nd</sup> Defendant acknowledged owing the said sums of money. The 1<sup>st</sup> Defendant signed a Notice of Assignment dated 15<sup>th</sup> June 2012 in which the 1<sup>st</sup> Defendant acknowledged receipt of the said Notice and agreed and consented to the assignment and further agreed to make the payments in the sum of K7,878,750.00 to the Plaintiff without

any set-off, counterclaim, withholding or deduction whatsoever. By 27<sup>th</sup> May 2013, the sum borrowed by the 2<sup>nd</sup> Defendant had risen to K10,116,506.

On 7 March 2014, the Plaintiff took out summons for leave to enter judgement. The summons was opposed by the 1<sup>st</sup> Defendant. When the summons came for hearing on 25<sup>th</sup> March 2014, the Plaintiff requested for an adjournment so that it could regularize the originating process. On 9<sup>th</sup> June 2014, the 1<sup>st</sup> Defendant issued a third party notice claiming indemnity against the 2<sup>nd</sup> Defendant. By a Consent Order dated 10<sup>th</sup> June 2014, it was agreed that the 2<sup>nd</sup> Defendant would wholly indemnify the 1<sup>st</sup> Defendant in the event that the Defendant were found liable. On 22<sup>nd</sup> June 2016, the Plaintiff gave notice to the effect that it had withdrawn the summons for directions to pave way for an application for leave that the action herein do proceed as if commenced by way of writ and that the parties herein be amended.

The Summons for Leave is supported by affidavit sworn by Asma Osman Kapoto. The substantive part of the summons reads:

- “J. ***THAT*** that the parties discussed that the matter would not be properly disposed by originating summons and suggested to proceed as if it began by Writ of Summons through a Consent Order amending the parties.
4. ***THAT*** the Defendants have failed to execute the said consent Order
5. ***THAT*** the factual issues of the matter will be properly determined through Writ of Summons.
6. ***THAT*** there is also need to amend the name of the 1<sup>st</sup> Defendant by showing the names of the proprietors of the 1<sup>st</sup> Defendant.
7. ***THAT*** the Plaintiff is therefore desirous of amending the parties herein as shown in red ink in the attached amendment.”

On the set hearing date of the Summons for Leave, namely, 28 June 2017, the 2 Defendant was absent. Counsel Kapoto sought leave to proceed with the case and I duly granted the leave for him to do so. Counsel Kapoto presented the Summons for Leave by adopting the affidavit and skeletal arguments in support thereof.

2 Counsel Misanjo did not have an objection, in principle, to the Summons for Leave as such. He was more concerned with the issue of costs. It might be useful to set out his submissions in full:

*“The proposed draft amendment has the effect of substituting parties. The 1<sup>st</sup> Defendant is a limited company but they want to change it to a firm. In such circumstances, I pray that the application be granted with costs to the 1<sup>st</sup> Defendant. Further, new parties should not be made responsible for cost this far ”*

Counsel Misanjo proceeded to make a similar argument as regards costs with respect to the Plaintiffs application to convert the originating summons to writ of summons. He submitted that the 1<sup>st</sup> Defendant is entitled to be awarded costs of converting the originating summons and that the costs be taxed forthwith.

Having carefully considered the matter, I fully agree with both Counsel that there are serious disputations on the facts in the case herein. It is trite that where factual disputes are substantial, then in terms of O. 5, r. 4 of the RSC, the matter is not appropriate to be begun by originating summons and it ought to proceed as if begun by writ. I am fortified in my view by the recently decided case (1<sup>st</sup> June 2015) of **Hetherwick Mbale v. Hissan Maganga, Misc. Civil Appeal Cause No. 21 of 2013 (unreported)** wherein I find the observations, at paragraph 86, by Mbendera SC, J.A. apposite:

*“In my years at the bar, you never used this procedure unless the proceedings arose under an Act of Parliament and one was compelled to use it. In all other circumstances you would only use it if the facts were agreed on all sides and all you sought from the court was construction or a question of law arising from the agreed facts. Here the facts were in dispute. I therefore find that the procedure adopted was altogether unsuitable. I further find that given the serious shades of disputation, the learned judge should have directed the parties to proceed as if the case was commenced by writ of summons with appropriate directions as to how the affidavits would stand.”*

In light of the foregoing, I order, pursuant to Order 29/8 of the RSC, that this matter should be proceeded with as if the same was commenced **by a writ** of summons. Accordingly, the Plaintiffs action shall be re-commenced **by way** of writ of summons (including a statement of claim) within 14 **days** hereof and the issues between the parties will have to be clearly stated in the pleadings: See **W. Mang’anda v. W. Chokani, HC/PR Civil Cause No. 3054 of 2000 (unreported)**.

With respect to costs, it will be recalled that this action is still effectively against Monolux Paints Limited, through its proprietors. In the circumstances, and in view

of the special nature of the facts of this case, the Court would exercise its discretion by ordering each party to bear its own costs so far incurred.

Pronounced in Chambers this 8<sup>th</sup> day of September 2017 at Blantyre in the Republic of Malawi.

The image shows two handwritten signatures. The first signature is enclosed in an oval and appears to be 'KND'. The second signature is a stylized, cursive mark.

Kenyatta Nyirenda JUDGE