



THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO. 63 OF 2017

BETWEEN

Saeed Ahmed Umar..... Plaintiff

AND

Yeremiah Chihana t/a Y.M.W Properties.....Defendant

---

CORAM:	Madalitso Khoswe Chimwaza	ASSISTANT REGISTRAR
	Namasala	Counsel for the plaintiff
	Katundu	Counsel for the defendant
	Mpandaguta	Court Clerk

---

**RULING ON SUMMONS FOR SUMMARY JUDGMENT**

**Introduction**

This was a summons for summary Judgement filed by the plaintiff under O. 14 Rules of the Supreme Court on the grounds that the defendant's defence is a sham.

The defendants counsel raised a preliminary objection to the application on the grounds that it was made under Rules of the Supreme Court which were obsolete as they had been repealed effectively by the repeal of Section 29 of the Courts Act through Section 7 of the Courts (Amendment) Act, 2016. Counsel for the defendant also relied on the decision of Her Hon Chipao in the case of *Damiano Meleka vs Malawi Mangoes Co. Ltd & NICO Generals* civil cause No. 377 of 2015.

Counsel for the plaintiff opposed the objection and invited the court to consider Section 13 and 14 of the General Interpretation Act, which is meant to cure a lacunae created by a repealed law and depart from the above cited decision.

### Reasoned Analysis of Law and Facts

Indeed **Section 7 of the Courts (Amendment) Act of 2016** repealed and replaced **Section 29 of the Courts Act**. The effect of this amendment is that the Rules of the Supreme Court (RSC) are no longer applicable in the High Court, since by **Section 67 of the Courts Act**, The Hon the Chief Justice is to make Rules for Practice and Procedure, for the High Court, which Rules are not yet in force at the moment thereby creating a gap in the Rules of procedure to be followed in the High Court.

Counsel for the defendant cited the case of *Damiano Meleka vs Malawi Mangoes Co. Ltd and NICO General Insurance Ltd* Civil cause No. 377 of 2015 in which the Assistant Registrar then H/H Chipao was faced with a similar application and held that the lacunae in the law could not be cured by applying an obsolete law and therefore an application for summary judgment was dismissed.

However in a recent judgment of the High Court in the case of *Mohssin Mahomed Salim vs Mac Donald Chapola* Civil Cause No. 317 of 2017, dated 24<sup>th</sup> July, 2017, Justice Mkandawire, held that:

‘...Rules of the Supreme Court are not obsolete, since they are subsidiary legislation and that the repealing of section 29 of the Courts Act did not automatically repeal the said Rules of the Supreme Court, unless they are also repealed’.

The Judge conceded that indeed the repealing of **Section 29 of the Courts Act**, has created a gap in the law, as the rules promulgated by the Chief Justice under **Section 67 of the Court Act**, were not yet in force.

He however stated that the purpose of **Section 13 and 14 of the General Interpretation Act** is to avoid a gap in the event when a written law repeals or replaces a former written law.

**Section 13 of the General Interpretation Act** states that:

Where a written law is repeals wholly or partially any former written law and substitutes provision for the written law repealed, the repealed written law shall remain I n force until the substituted provision come into operation.

Further **Section 14 (1) of the General Interpretation Act** states that :

Where a written law repeals and re-enacts with or without modification, any provision of any other written law, then unless a contrary intention appears;

(e ) any subsidiary legislation made under such repealed provisions shall remain in force, so far as it is capable of being made under the repealing written law and is not inconsistent therewith, until it has been revoked or repealed by any other written law,

### Reasoned Analysis of Law and Facts

Indeed **Section 7 of the Courts (Amendment) Act of 2016** repealed and replaced **Section 29 of the Courts Act**. The effect of this amendment is that the Rules of the Supreme Court (RSC) are no longer applicable in the High Court, since by **Section 67 of the Courts Act**, The Hon the Chief Justice is to make Rules for Practice and Procedure, for the High Court, which Rules are not yet in force at the moment thereby creating a gap in the Rules of procedure to be followed in the High Court.

Counsel for the defendant cited the case of *Damiano Meleka vs Malawi Mangoes Co. Ltd and NICO General Insurance Ltd* Civil cause No. 377 of 2015 in which the Assistant Registrar then H/H Chipao was faced with a similar application and held that the lacunae in the law could not be cured by applying an obsolete law and therefore an application for summary judgment was dismissed.

However in a recent judgment of the High Court in the case of *Mohssin Mahomed Salim vs Mac Donald Chapola* Civil Cause No. 317 of 2017, dated 24<sup>th</sup> July, 2017, Justice Mkandawire, held that:

‘...Rules of the Supreme Court are not obsolete, since they are subsidiary legislation and that the repealing of section 29 of the Courts Act did not automatically repeal the said Rules of the Supreme Court, unless they are also repealed’.

The Judge conceded that indeed the repealing of **Section 29 of the Courts Act**, has created a gap in the law, as the rules promulgated by the Chief Justice under **Section 67 of the Court Act**, were not yet in force.

He however stated that the purpose of **Section 13 and 14 of the General Interpretation Act** is to avoid a gap in the event when a written law repeals or replaces a former written law.

**Section 13 of the General Interpretation Act** states that:

Where a written law is repeals wholly or partially any former written law and substitutes provision for the written law repealed, the repealed written law shall remain In force until the substituted provision come into operation.

Further **Section 14 (1) of the General Interpretation Act** states that :

Where a written law repeals and re-enacts with or without modification, any provision of any other written law, then unless a contrary intention appears;

(e ) any subsidiary legislation made under such repealed provisions shall remain in force, so far as it is capable of being made under the repealing written law and is not inconsistent therewith, until it has been revoked or repealed by any other written law,

and shall be deemed for all purposes to be subsidiary legislation made under such repealing written law.

In view of the fact that the Rules of the Supreme Court were subsidiary legislation, by the authority of **Sections 13 and 14(1) (e) of the General Interpretations Act** they are still applicable Rules to the High Court. The two provisions gives life to a repealed law until it is replaced.

Therefore objection to the application for summary Judgment is overruled. The plaintiff is entitled to proceed with the application for summary judgment.

Either party aggrieved by the decision has the right of appeal.

Made in Chambers this 27<sup>th</sup> day of July 2017



Madalitso K. Chimwaza

**ASSISTANT REGISTRAR**