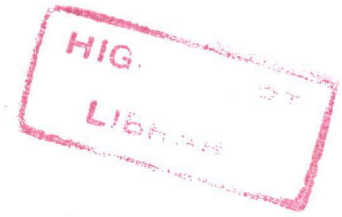


The Judiciary



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CIVIL CAUSE NUMBER 08 OF 2015

BETWEEN

FRIDA KAONGA.....PLAINTIFF

AND

AARON GADU.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED..... 2ND DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. M. Chiwaya, of counsel, for the Plaintiff

Mr. E. Mbotwa, of counsel, for the Defendant

Mrs. F.M. Luwe, Clerk/Official Interpreter

Banda, AR

RULING

Background

This is an application by the plaintiff for an order of leave to revoke notice of withdrawal and discontinuance made under Order 21 of the Rules of the Supreme Court and Court's Inherent Jurisdiction. The application was supported by an affidavit sworn by the plaintiff's legal counsel Mr. William Chiwaya. The application was supposed to come ex parte but since the defendants' counsel had prior notice of the application they did appear by counsel Evans Mbotwa.

Evidence

In the affidavit, Mr. Chiwaya deponed that the plaintiff filed a notice of withdraw and discontinuance of proceedings on 8th day of September, 2016 on the ground that there was a similar matter registered as Civil Cause No. 219 of 2015 between the same parties. He stated that the legal practitioners of the plaintiff were under the impression that they were withdrawing and discontinuing the matter that was registered as Civil Cause No. 219 and not this one registered as Civil Cause No. 8 of 2015. He said this Civil Cause No. 8 of 2015 was the first one to be registered and it should have been the later registered matter that should have been discontinued for being registered when there was already another matter.

He stated that the withdraw and discontinuance should be rendered null and void for the fact that it was done mistakenly. He said that the interest of justice would be served if to revoke the notice of withdraw and discontinuance in this matter and be allowed to file a notice of withdraw and discontinuance of the matter Civil Cause No. 219 of 2015. He therefore prayed that the court grants the plaintiff leave to revoke the notice of withdrawal and discontinuance. The defendants did not file an affidavit and as such they only made oral submission.

Submission

The plaintiff submitted that the purported notice of withdraw was filed without leave of the court which was contrary to the rules of procedure under Order 21 rule 2 of the Rules of Supreme Court. He said that since the withdraw and discontinuance was done after 14 days after the writ of summons, it needed leave which was not taken in this case therefore the exercise was a nullity.

The defendant's counsel submitted that once there has been a discontinuance, all issues fall off, but a fresh proceeding is allowed citing the case of **National Bank of Malawi v. Zgambo and Another** [1994] MLR 239. He said that since there was a discontinuance the plaintiff cannot be allowed to proceed in the same matter. He further cited the case of **Poyser v. Minors** [1881] 7 QBD 329 AC in which it was stated that a discontinuance is a direct termination of a case that no part of it survives.

Counsel for the defendants further stated that the plaintiff should not rely on their own mistake in this application to state that the withdraw and discontinuance was a nullity.

Issue

Whether the withdrawal and discontinuance of the Civil Cause No. 08 of 2015 should be revoked for being a nullity or not.

Determination

It is clear that the plaintiff caused two matters to be registered with the court. One wonders how this happened. Perhaps it was sheer lack of proper record keeping when the client came to follow up with his lawyers it was felt that the matter had not been brought before the court already. What was clear though was that there were two matters concerning the same parties, over the same issues and reliefs sought. The plaintiff's lawyers upon such knowledge decided to withdraw and discontinue one case. They wanted the later one, Civil Cause No 219 of 2015 withdrawn and discontinued but erroneously ended up withdrawing and discontinuing these present proceedings, Civil Cause No. 08 of 2015. Now the plaintiff wants to rectify that error.

I agree with counsel for the defendant that there is nothing that survives after a withdraw and discontinuance of a matter. The suit terminated. Counsel for the plaintiff argues that the attempt was futile as the requirements of Order 21 of the Rules of the Supreme Court were not met. He wants the withdraw and discontinuance revoked and this proceeding maintained, which as counsel for the defendants rightly states will have the effect of having the two matters alive, an undesirable thing in the administration of justice. However, the plaintiff goes further to state that he will then take process to withdraw and discontinue the matter that he at first intended to withdraw. The question the court considered is whether this process is necessary at all, and what would be amiss to proceed with the matter that was not withdrawn, even though it was the one intended to be withdrawn. Would the plaintiff be prejudiced in any way?

It is the consideration of the above questions that drove me to look at the interests of justice. The plaintiff will have withdrawn and discontinued this matter, clearly erroneously as it is, after a defence was already entered in this case with the effect that he may not be allowed to commence a matter on similar facts again with such a discontinuance. The Civil Cause Number 219 of 2015 was a later case. The defendants can, with the determination of a court pray for the dismissal of the Civil Cause No. 219 of 2015 after this very one is dismissed. The plaintiff would thus not be heard on merits based on technical mistakes. Justice demands that matters are decided on their merits. The court should not dwell too much on technicalities to the detriment of justice. This however, is not to water down the importance of procedural law. It is that premise that procedural law is important that I find that there was procedural impropriety in the way the withdrawal of the matter Civil Cause No 08 of 2015 was withdrawn and discontinued. For those reasons, I grant the plaintiff's prayer. Costs of this application to be borne by the plaintiff even though she is successful.

To avoid a duplication of causes, I order that the plaintiff move the court for the withdrawal and discontinuance of the matter Civil Cause No. 219 of 2015, within 14 days of the receipt of this order. Costs therein to be decided in the discretion of the court. The receipt of a copy of this order by both parties to be acknowledged on file with the assistant registrar or registry clerk.

Made this 8th day of June, 2018.



Austin Jesse Banda
ASSISTANT REGISTRAR
