



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 455 OF 1980

BETWEEN

R J K ZGAMBO.....FIRST PLAINTIFF

AND

AROMA ESTATE COMPANY LIMITED..... SECOND PLAINTIFF

AND

AGRICULTURE MANAGEMENT CONSULTANCY.... FIRST DEFENDANT

AND

MIKE BOLAM..... SECOND DEFENDANT

AND

NKHAWANAWO ESTATE COMPANY LIMITED.....THIRD DEFENDANT

Coram: Hon Jack N'riva, Judge

plaintiff present and represented by Dr. Bazuka Mhango, SC and Mr Nampota of Counsel

Mr. M Chisanga of counsel representing National Bank of Malawi

Mrs. Mtegha Court Clerk

ORDER

Background and Introduction

The plaintiffs, R J K Zgambo and Aroma Estate Company Limited, commenced in 1980 an action here at the Principal Registry against Agriculture Management Consultancy, Mike Bolam and Nkhawanawo Estate Limited. The case concerned loss of some tobacco barns. The plaintiffs commenced another action against National Bank of Malawi in the Mzuzu Registry of the High Court. The Court in Mzuzu stayed the hearing of the Mzuzu matter because National Bank had argued that the matter was related to the matter that was before the Principal Registry. The bank was also of the view that the Mzuzu action was frivolous, vexatious and abuse of the court process.

The Court record in respect of the action in Blantyre went missing. Now the plaintiffs want to add National Bank of Malawi to the case that was (is) before the Principal Registry. Further to that, the plaintiffs want the Court to enter judgment against the National Bank of Malawi Limited for the sum of K2,667,948 and assess interest on the sum. The other application is for recoverable costs and party and party costs.

I will first deal with the issue of adding National Bank as a party. This is important because that is the primary issue before we can consider the issue of entering judgment against National Bank of Malawi.

Plaintiffs' Arguments as to Why National Bank of Malawi Limited Should Be Added as A Party

The plaintiffs argue that National Bank of Malawi Limited was closely related to the matter and the Court should order that the bank should be added as a defendant: The plaintiffs argue that National Bank of Malawi contended that the action in Mzuzu was the same as the proceedings in the Principal Registry. National Bank of Malawi,

on behalf of the defendants, entered a compromise agreement where National Bank of Malawi agreed on behalf of the defendants to settle the claims in the sum of K3,112,606.

The plaintiffs argue that adding National Bank of Malawi to the proceedings would ensure that all the parties involved in the matter are present. This will also ensure that once the matter is concluded in this court, there will be no need to remove the stay order in the Mzuzu matter.

The plaintiffs argue that there is no dispute to the fact that National Bank of Malawi entered into an agreement to pay for the sums of money in issue. Further to that, since 1982, the defendant did not make any payment to the plaintiffs.

Therefore, the plaintiffs argue that there is nothing in this matter for substantial adjudication.

Background According to National Bank of Malawi Limited

According to National Bank of Malawi Limited, when the plaintiffs commenced the 1980 matter, the defendants made payment to the plaintiffs. Later, a dispute arose as to whether the payment by the defendants was full and final settlement of the plaintiffs' claims. The plaintiffs brought up the issue in the High Court and they were successful.

The defendants appealed to the Supreme Court and the Supreme Court held that the release and discharge of September, 1981 did not bar the plaintiffs to make further claims. The Court held that the plaintiffs were free to continue with the case.

The plaintiffs made an application to amend their statement of claim. The parties reached another compromise where the defendant was to pay K444,658 in full and final settlement of the plaintiffs' claim. The plaintiffs claimed that the sum represented one barn only and that K2,667,948 was remaining. This became another dispute, according to National Bank of Malawi.

The plaintiffs commenced another matter suing National Bank of Malawi Limited in the High Court in Mzuzu. National Bank made an application to dismiss the action for being frivolous and an abuse of the court process.

The Court ordered that the matter should be stayed pending the conclusion of the proceedings in the case in Blantyre. Since the stay, no proceedings took place in

order to conclude the matter in Blantyre. Different lawyers have dealt with the matter. After many years, the matter has arisen again amid revelation that the file of the case in Blantyre, has gone missing.

Arguments of National Bank of Malawi

National Bank of Malawi has raised several issues against the plaintiffs' application. First, the argument is that the parts of the Courts (High Court) (Civil Procedure) Rules 2017 that the plaintiffs have made reference to are not relevant to the application. Counsel ordered that Order 10 is about ending a proceeding early; Order 12 Rule (4) is about entering a judgment without a hearing. Order 12 Rule 9 is about assessment of damages.

The intended defendant further argued that *Nseula v Attorney General*, [1996] MLR 406, one of the authorities the plaintiffs relied on, was not applicable to this application. Counsel argued that the decision in *Nseula v Attorney General* was made under the Rules of the Supreme Court and the plaintiffs have not shown the rule under which the plaintiffs have made the application.

The other argument of the intended defendant is that of limitation. Counsel argued that the matter arose between 1979 and 1980 making the claims to be statute-barred. Counsel made reference to *Lipton Cash Registers and Business Equipment v Hugin and another* [1982] 1 All ER 595 and *Liff v Peasley and another* [1980] 1 All ER 623. These decisions are to the effect that it would be unfair to add a defendant to proceedings if the addition would disentitle the defendant to plead limitation statute.

In summary, the intended defendant, argued that there is no basis on which to add National Bank of Malawi Limited as a party.

Mr Chisanga raised issues with the way this Court has acted in commencing this application in this matter. He argued that the Court acted as if there was a judgment against National Bank of Malawi Limited and as if the bank was already party to the proceedings. Counsel argued that the Court acted as if the bank was responsible for the missing of the file in this matter and that they should be punished for that.

Counsel argued that there is evidence that file went missing and there is no evidence that any of the parties was responsible for that.

Counsel argued that there was the issue of payment of K444,658 by the defendants as full and final satisfaction of the claims, according to the understanding of the defendants and not National Bank of Malawi. Counsel further argued that there was also a contentious issue as to whether the K444,658 was payment in relation to one barn.

Furthermore, counsel argued that there was no evidence that National Bank of Malawi was admitting liability. Additionally, the plaintiffs elected to bring an action against the other defendants and not National Bank of Malawi. Under Agency Law, counsel argued, one can choose to sue the agent or the principal. In that case, one cannot come back to add the other as a party.

Counsel argued that the issues in the matter are contentious and there is need for evidence for the Court to come to conclusion of the claims in the matter.

Response by the Plaintiffs

The plaintiffs argued that they brought the application under Order 6 Rule 5 of Courts (High Court) (Civil Procedure) Rules. The plaintiffs further said that according to *Nseula v Attorney General*, the Court has discretion to add a party to a proceeding if doing so would do justice to the parties. The plaintiff reiterated that the third defendant was a subsidiary of National Bank of Malawi Limited and that the defendant is no longer in existence. Further to that National Bank of Malawi Limited was actively involved in the transactions between the parties. The plaintiffs, therefore, suggested that the Court should lift the veil of incorporation and find the real actors in the matter. The plaintiffs further urged the Court to apply the principals of agency and find that National Bank of Malawi Limited was the principal in the circumstances.

On the issue of limitation, the plaintiffs argued that the matter was not statute-barred as the Supreme Court of Appeal ruled in the lines that the claim in the action was not statute-barred.

The other point that the plaintiffs raised was that the matter cannot be statute-barred because the plaintiffs were under disability as the file went missing. Counsel said that the plaintiffs could not do anything until the Honourable the Chief Justice intervened in the matter.

In summary, the plaintiffs argued that the matter should not go for trial, and the court should just refer to the material on the record and add National Bank of Malawi and enter judgment. They reiterated that there is nothing worth trial arguing that the issue before the court was about seven barns. The defendants could, therefore, not argue that the money they paid (which was for one barn only) was in full and final discharge of the claim. Furthermore, the matter before the Supreme Court concerned seven barns and National Bank of Malawi Limited is also conceding that they paid for only one barn.

The plaintiffs argue that National Bank of Malawi has also been playing tricks since 1981.

Issue for Determination

Having outlined the parties' positions, the question is whether to add National Bank of Malawi as a party to the proceedings.

Procedural Rules for Adding a Defendant

Counsel for the plaintiffs quoted Order 6 Rule 5 of the Courts (High Court) (Civil Procedure) Rules, as the authority for their application to add National Bank of Malawi as a defendant. In addition, or the alternative, as the case may be, the plaintiffs ask the court to invoke its inherent jurisdiction to add a defendant.

Counsel for the intended defendant argues that the plaintiffs have no authority under which to make the application. They even argue that the *Nseula v Attorney General* decision which the plaintiffs relied on was a decision made under the Rules of the Supreme Court.

Order 6 of Courts (High Court) (Civil Procedure) Rules is the authority for addition of parties. From the provision, the issue is not coming out clearly on addition of defendants to a case. Order 6 rule 5 talks of adding as a defendant a person who does not consent to be a claimant.

The Court may, on an application by a party, order that a person becomes a claimant in a proceeding where the person's addition as a party is necessary to enable the Court to make a decision fairly and effectively in the proceeding.

In Order 6 Rule 4, the rules talk of adding a party, generally, without permission of the Court, before the service of summons.

A person may be added as a party without the permission of the Court before the summons has been served by endorsing that person's name on copies of the summons.

After the service of summons, the law appears to be limited on the issue of adding a defendant to proceedings.

When we were using the Rules of Supreme Court, as *Nseula v Attorney General* shows, generally, the Courts had powers to add parties to proceedings. The current procedural rules of England, Civil Procedure Rules, 1998, retain the power on the courts to add parties to proceedings. See Civil Procedure Rules, 1998 Part 19. It appears to me that it might have been an oversight, on the part of the drafters, to exclude authority on the Court to add defendants as is the case with adding claimants. I believe that the failure to add defendants would lead to injustice where justice would better be served by adding such a party. In Order 6 Rule 5, a court may add a claimant if doing so would achieve fairness and effectiveness in dealing with the proceedings. If it is possible to add claimants, why should that not be the case with defendants? If adding a defendant would lead to fairness and effectiveness, why should the Court not add that party?

The approach of adding defendants was available under the previous regime of the rules. The approach is also obtainable in Civil Procedure Rules, 1998 of England and other comparative civil procedural regimes, for example in Kenya (Civil Procedure Rules, 2010). Because of that, I believe the Court can, as the plaintiffs argue, exercise inherent jurisdiction to add a party subject to the overriding principles of the Courts (High Court) (Civil Procedure) Rules.

Thus, the Courts can still exercise discretion as expounded in *Nseula v Attorney General* but under the modern approach to procedural rules. Even under the English Civil Procedure Rules, 1998, there are new dynamics as to how to add parties to proceedings.

The dynamics also include the aspect of fairness. It is a question of balancing fairness on both the parties.

In this matter, the plaintiffs intend to add National Bank of Malawi after the Court in Mzuzu stayed the proceedings of the 2002 action pending the conclusion of the 1980 matter. One can argue that the plaintiffs intend to commence, in another fashion, the 1980 claims against a new defendant. It is also not in dispute that plaintiffs commenced against National Bank of Malawi in another case in Mzuzu Registry of the High Court. They did not choose to add National Bank of Malawi in the matter that is in this registry. The plaintiffs had a chance to add National Bank of Malawi as a party to this matter at an earlier time. In *Securum Finance Ltd v Ashton* [2001] Ch 281, a claimant was denied a chance to have a “second bite of the cherry” for starting a fresh action. In *Ann Kent v (1) M & L Management & Legal Ltd (2) Joseph Graham Chapper* [2005] EWHC 2546 (Ch), the Court declined to rejoin a defendant arguing that it was not possible for him to receive a fair trial.

In summary, Courts may add a defendant to proceedings subject to fairness as well as the overriding principles in the Courts (High Court) (Civil Procedure) Rules

Limitation Period

Counsel for the defendants argues that the claim against National Bank of Malawi is statute-barred. The plaintiffs argued that the matter was not statute-barred because the Supreme Court of Appeal decided that the claim was not caught by the Limitation Act. Secondly, the plaintiffs were under a disability as they could not bring an action against National Bank of Malawi.

The decision by the Supreme Court of Appeal to the effect that the plaintiffs’ action was not statute-barred was in relation to the claim by the plaintiffs against the defendants. The question was whether the claim in that matter was statute-barred. The Court found that the plaintiffs were free to commence the action as the matter was not statute-barred.

I do not believe that that holding extends to the addition of other defendants to these proceedings. According to *Mitchell v Royal Bank of Scotland and another* [2011] EWC Ch a party seeking permission to amend a case must show that the claim was not statute-barred at the time of the proposed amendment.

In *Godfrey Morgan Solicitors v Armes* [2017] EWCA Civ 323, the Court said

‘The provisions of section 35 of the 1980 Act and the CPR do not invest a court with power to allow an amendment to proceedings to bring in a new party after the expiry of a limitation period whenever it considers it equitable to do so.

Further

Parties are entitled to rely upon limitation as providing protection, save in so far as legislation and rules of court otherwise provide.

Secondly, on the issue of disability, the plaintiffs argue that they were under disability to add National Bank as a party. They base this argument on the fact that the Court record in the matter is missing.

On the claim of disability, the plaintiffs rely on the decisions in *Banda v Attorney General* [1996] MLR 455 and *Chirwa v Malawi Housing Corporation* [1998] MLR 62.

The cases the plaintiffs cited raise issues of legal disability to sue under the one-party era in Malawi. In *Banda v Attorney General*, the Court held that the political environment in Malawi during the one-party dictatorship provided a case of disability. The reasoning was that it was impossible for people to bring actions against the government. In that case, the court upheld claim of limitation disability. In *Chirwa v Malawi Housing Corporation*, the court held that the concealment of the right to sue the government was, in itself, a disability.

The question is whether the plaintiffs were under such a disability as not to add National Bank of Malawi to their claims.

In my judgement, the plaintiffs cannot be said to be under a disability merely because the Court record at the Principal Registry went missing. I do not believe that that fact could not enable the plaintiffs to commence the action against National Bank of Malawi or to add them as a party to these proceedings, as they are doing right now.

In fact, the plaintiffs were able to commence another action in 2002 against National Bank of Malawi in the Mzuzu registry which the Court stayed pending the conclusion of these proceedings.

There has been an argument that National Bank of Malawi obtained the stay order well knowing that the Court record at this registry was missing. In my view, that is a question of fact that needs supporting evidence. More to that, I doubt if, again, that

can be said to be a case of disability for the plaintiffs to commence a case against the defendant.

In all this, I feel more inclined to hold that making National Bank of Malawi a party would be caught under limitation. In *Lipton Cash Registers Business Equipment Ltd v Huggins* [1982] 1 All ER 595, the Court held a party should not be added to proceedings if the effect of the addition would be to deprive a defendant a defence under limitation acts. See also *Liff v Parsley and another* [1980] 1 All ER 626

Lifting the veil and Agency Arrangement

The plaintiffs urged the Court to scrutinize the relationship between National Bank of Malawi and the other defendants. The argument was that National Bank of Malawi might have been the main actor albeit behind the scenes. Two arguments arose. First, that the other defendants might have been agents of National Bank of Malawi. Secondly, National Bank of Malawi might be hiding under the notion of separate legal personality, when they were in fact the real actors in the issue. Apart from that, the plaintiffs have demonstrated the actual active participation of National Bank of Malawi in the case between the plaintiffs and the defendants.

These allegations are quite contentious. Being contentious, I believe those are matters that would require evidence to prove or rebut the assertions. Whether, the defendants were acting as agent for National Bank of Malawi is a question of fact. In *Smith, Stone and Knight, Ltd v Lord Mayor, Alderman and Citizens of the Birmingham* [1939] 4 All E R, 116, the Court held that there would be need for evidence to show whether a subsidiary was acting for the principal or on its own.

There is a defence in agency law that where a party chooses to sue a principal, he or she (the suing party) would be precluded from further proceeding the agent. Similarly, if one sues the agent, they cannot turn around and sue the principal in the same proceedings (Bullen & Leake & Jacob's Precedents of Pleadings 12th edition page 923 quoting *RMKRM v MRMVL* [1926] AC 761. See also *Kendall v Hamilton* [1920] KB 919).

In *RMKRM v MRMVL*, where there was a change in partnership, an election to sue a new partnership was held to be a bar to proceeding against the late partner.

Therefore, the assertion that National Bank of Malawi was the main actor, is in want of evidence. The Court cannot determine that issue based on sworn statements alone.

There are other factual and legal requirements that have to be satisfied, for the Court to find the actual participation of National Bank of Malawi, or that the other defendant was acting on behalf of National Bank of Malawi.

There have also been issues of the National Bank of Malawi entering into compromise agreements on behalf of the other defendants. That, again, is a factual issue for determination whether that meant that the bank was the actual party to the proceedings. Apart from that, there are disputes to the amounts involved, whether those amounts were for the part of or for the whole debt. The other dispute is whether the payments were a final obligation of the defendants or not. Then there is a question as to whether the entry by National Bank of Malawi into the compromise agreements was an admission of liability. Of course, that issue is more to do with the issue of the entry of judgement. The issue here is whether to add National Bank.

The short of it is that to enter National Bank of Malawi as a party is an issue of contention. It is not an issue where one can say that the facts are not in dispute as to merely depend on the sworn statements.

One can argue that, if they wanted, the plaintiffs would have added the National Bank of Malawi as a party earlier. The question is whether it would be fair to add National Bank of Malawi thirty years later. If the plaintiffs were minded, they would have added National Bank even after Mzikamanda J's observations in the Mzuzu court.

Conclusion

The dynamics of adding parties to proceedings are rooted in fairness and effectiveness in dealing with cases. The law requires that adding defendants to the proceedings should be within the period in which one can commence an action. The law is such that the defence should not be deprived of the defence of limitation. The dispute in this matter arose in early 1980s. To add National Bank of Malawi at this point would be unfair and also to deprive them of their right to rely on the defence of limitation. It has taken long for the plaintiffs to add National Bank of Malawi to this case.

I do not agree that the plaintiffs were under a disability to commence an action against National Bank of Malawi within the rightful period within which to

commence an action. Therefore, the claim by the plaintiffs against National Bank of Malawi is beyond the period within which they could have commenced the action.

Likewise, it needs facts to investigate whether National Bank of Malawi was the main actor to the facts leading to this dispute. That is also the case with whether one of the defendants was an agent of National Bank of Malawi.

I, therefore, dismiss the application to add National Bank of Malawi as a party.

Delivered the 4th day of June, 2018

A handwritten signature in black ink, appearing to be 'J NRIYA', written in a cursive style.

J NRIYA

JUDGE