



The Judiciary
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 887 OF 2014

BETWEEN

MASTER NOTICE.....CLAIMANT

AND

MALAWI REVENUE AUTHORITY.....1ST DEFENDANT

UNITED GENERAL INSURANCE COMPANY LIMITED..... 2ND DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. Ching'ande, of counsel, for the Claimant

Mr. Maliwa, of counsel, for the Defendants

Ms. M. Galafa, Clerk/ Official Interpreter

Banda, Assistant Registrar

RULING

Background

The claimant in this case obtained a judgment in default on the 2nd day of October, 2014. The 2nd defendant tried to challenge the default judgment but the attempt was unsuccessful. On 16th November, 2016, the claimant obtained an order in his favour, giving him liberty to enforce the default judgment. On 2nd November, 2017, the claimant obtained an appointment with the registrar for assessment of damages, which the registrar scheduled to take place on the 22nd day of March 2018. The 2nd defendant filed a notice of preliminary objection on 21st March, 2018 on the ground that the Assistant Registrar has no jurisdiction to entertain the present

proceedings under Order 35 rule 6(3) and Order 25 rule 1 (n) of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR). There was a further notice that the court would be moved to declare the proceeding a nullity for being taken by a lawyer not licenced to practice under section 23(3) of the Legal Education and Legal Practitioners Act. However, this was not prosecuted on the day of hearing. I heard arguments from both counsel on the question whether the Registrar has automatic jurisdiction to hear and determine an assessment of damages, a step in a proceeding. Both counsel also made written submissions for which I am very grateful, as they have informed this ruling.

The Arguments

It was the argument of Mr. Patience Maliwa, counsel for the 2nd defendant, that the registrar does not have automatic jurisdiction to preside over assessment of damages proceedings, without prior direction from a Judge. He cited section 9 of the Constitution as a fundamental provision that empowers judicial officers preside over matters. The provision spells out the functions of the judiciary and enjoins the judiciary to enforce and protect the constitution and all laws, which counsel states includes the CPR.

Counsel further argued that a matter of jurisdiction is so fundamental that a court that proceeds where it lacks jurisdiction, does everything it does in vain as everything that a court does out of its jurisdiction is a nullity. He cited the case of Mbale v. Maganga, Supreme Court of Appeal, Civil Appeal Cause Number 21 of 2013 in which the late Justice Maxon Mbendera, SC stated as follows:

Where proceedings are conducted by a court without jurisdiction they are and should be declared null and void. There is nothing to save. There is nothing to salvage.

Counsel Maliwa argued that the court does not exercise power in a vacuum, but that jurisdiction of the court is sourced from the law. Counsel stated that under Order 12 rule 19(1) of the CPR, it is only the Judge who is referred to as *the court* and not the registrar. The said rule reads:

'The court shall conduct the assessment of the amount of damages in the same way as trial.'

Counsel further stated that the definition of court does not include the registrar under section 5 of the Courts Act which is couched as follows:

The High Court shall consist of the Chief Justice and such number of other judges as the president may from time to time, appoint.

Counsel Maliwa said a reading of section 5 of the Courts Act clearly shows that the High Court only consists of the Chief Justice and Judges. This view, according to counsel is buttressed by the definition of the High Court in the General Interpretation Act section 2. He stated that the

GIA defines the High Court as is established under section 108(1) of the Constitution. He cited section 109 of the Constitution that provides for the composition of the High Court. The section is as follows: -

The judges of the High court shall be such number of judges, not being less than three, as may be prescribed by an Act of Parliament.

According to counsel Maliwa it is conclusive that the registrar of the High Court does not have automatic jurisdiction to preside over assessment of damages proceedings.

The 2nd defendants also found section 8 (1) of the Courts Act fundamental. Counsel said the section provides for the exercise of powers by the Registrar and Assistant Registrars. According to counsel, in that section Registrars are to exercise any power exercisable by Registrar of the High Court and Master of the Supreme Court of Judicature in accordance with the RSC and any rules prescribed by the Chief Justice. He said the provision was the reason Registrars and their Assistants had automatic jurisdiction over proceedings on assessment of damages under the RSC. The RSC having been repealed and the Chief Justice having prescribed the CPR, counsel argues, the governing rules on the jurisdiction of Registrars to preside over assessment of damage proceedings are the CPR.

Counsel Maliwa then invited the court to Order 25 rule 1(a) of the CPR which provides as follows: -

Subject to the direction of a Judge, the Registrar may exercise the jurisdiction, power and functions of the court to make, or refuse to make, an Order on any or all of the following.

...

(n) assessment of damages. [Emphasis supplied]

The 2nd defendant made the following observations from the above quoted provision: -

1. That the provision supports the conclusion already made that assessment of damages is the reserve of judges and not of the registrar and that, the court as used in **Order 12 rule 19** refers to a judge and not the registrar. This is because the provision recognizes the power to assess damages as the power and function of the court. The provision also uses the word "court" in relation to a judge.
2. That the provision makes the jurisdiction of the registrar to attend to assessment of damage proceedings conditional on prior direction from a judge.

It was counsel Maliwa's assertion that where the registrar has not been directed by a judge to entertain an assessment of damages proceeding, the registrar has no jurisdiction to so do and must according to Order 25 rule 2 refer the said application to the judge who may either hear the application or direct the registrar to attend to it. Counsel therefore submitted that the registrar who has not been directed by a judge to attend to proceedings on assessment of damages has no jurisdiction so to do.

In the course of hearing this application by the defendant, arose an issue which is a moot point as far as this application is concerned but nevertheless helps put the issue in perspective. This is the question as to where an appeal of the decision made by the registrar in an assessment of damages lie, where a party is dissatisfied with it.

Counsel Maliwa argued that prior to the advent of the CPR the predominant position was the one taken by the Supreme Court of Appeal in *Dziko Nasiyaya v. Attorney General, MSCA Civil Appeal number 07 of 2012*. The proponents of this position argued that an appeal from an order of assessment of damages by the Registrar lies to the Supreme Court of Appeal. He submitted further that another position was the one taken in *Anwar A. Gani v. Ivy Chande [2006] MLR 25*. This position was to the effect that an appeal on an order of assessment of damages by the registrar lies first to a judge in chambers pursuant to **Order 3** of the High Court (Exercise of Jurisdiction of the Registrar) Rules. Counsel argued that the view that appeals from the registrar on an order of assessment of damages lie to the Supreme Court of Appeal, were influenced by the dictates of **Order 58 rule 2 RSC** which is now repealed by the CPR.

Much as the position in *Chande case* was overruled in *Dziko case*, counsel submitted that in light of the then **Section 29** of the Courts Act, the correct position was the one in the *Chande case* which was to the effect that such appeals lie to a judge in chambers. The reason for that submission, according to counsel, was that reliance of the RSC was pursuant to the then **Section 29** of the Courts Act. According to the section, provisions in the RSC were applicable in Malawi only when there was no local law providing for the same. **Rule 3** of the High Court (Exercise of jurisdiction of the Registrar) Rules, which provided that such appeals lie to the judge in chambers was a local law and therefore the first point of call according to the then section 29 of the Courts Act. Accordingly, it was argued that there was therefore no need to seek recourse to the dictates of **Order 58 rule 2 RSC** as such an approach had no legal basis.

Counsel Maliwa submitted therefore that since both the RSC and the High Court (Exercise of jurisdiction of the Registrar) Rules were repealed by the CPR, the only time an appeal on an order of assessment can lie directly to the Supreme Court is when the same was handled by a judge. Where the same was handled by the registrar pursuant to **Order 25 rule 1 (n)**, an appeal on the same must lie to a judge.

The Claimant's position in opposition to the objection is that the Judge's directions are not antecedent to the Registrar's jurisdiction to assess damages. Counsel Ching'ande argued that the jurisdiction of the Registrar is, by O.25, r. 1 (n) CPR, already granted to the Registrar without more to be done or less to be undone before the Registrar can exercise it. He said that the opening clause to Order 25, rule 1 CPR renders that jurisdiction amenable to the senior and superintending jurisdiction of the Judge. Counsel stated that the 2nd defendant's reading of Order 25, rule 1 - the "subjection and direction" clause to Order 25 rule 1 is erroneous, probably made because of where the draftsman placed the words "subjection and direction" at the beginning of the rule, rendering the 2nd defendant into the error of interpretation of applying that (subjection and direction) clause geographically – where the draftsman placed it – at the basement of the Order – and yielding the untenable position that the Judge's direction and subjection of the Registrar must first obtain before the Registrar can exercise or assume the jurisdiction.

Counsel Ching'ande said even putting the subjection and direction clause at the end, or indeed in the middle of the rule would not have yielded a different rendering, say geographically, as to allow the holding that the Judge's directions can only come after the Registrar has finished exercising the jurisdiction and made a finding or ruling in the assessment of damages proceedings.

Counsel argued that the correct position still ought to be that the Registrar may, as of right or automatically bear the jurisdiction and the exercise of such jurisdiction may be under the superintendence and direction of the Judge. Counsel argued that the direction(s) of the Judge spoken of under O.25, r. 1 is not an initial direction or a direction to initiate or confer jurisdiction to the Registrar but that a recurring direction generally due unto the Registrar as and when appropriated at any point through and after the currency of the Registrar's exercise of his jurisdiction.

The claimant faulted the defence reliance on the CPR reference to a Court assessing damages in Order 12, r. 19; and in the CPR definition of court in Order 1, rule 4 where Court is the High Court of Malawi; And in the Courts Act's consistence of the High Court of Malawi being under Section 5 thereof – the Chief Justice and a panel of puisne Judges as appointed at any given time. He stated that the defence elected not to address that the Chief Justice who like the Judges under Section 5 is a prime constituent of the High Court, who is made senior by section 6 of the Courts Act.

The claimant stated that under section 67 of the Courts Act, the Chief Justice has powers to make rules for active, expeditious and efficient case management, and the registrar can cede or delegate the powers and functions and jurisdictions of the High Court of Malawi to Registrars,

District Registrars, Deputy Registrars and Assistant Registrars. He stated that under the said Section 67 of the Courts Act, the Chief Justice of the High Court in 2017 made and gazetted Rules of the High Court [the CPR]. And under Order 25 thereof the Chief Justice created jurisdictions for the Registrars one of which is to assess damages [O.25, r.1(n)]. It is folly, the claimant through counsel argued, to read the law [O.25 r.1(n)] to define that it is the Judge of the Court who by a direction there referred, confers a Registrar the jurisdiction, powers and functions in issue. A Judge, most senior of the Judges of the High Court, and the only single one empowered by law [Section 67 of the Courts Act] to make Rules of Court and thereby regulate the institution of the Court of the Registrar of the High Court, had already by, besides Sections 7 and 8 of the Courts Act, promulgating Order 25, rule 1, produced for or conferred the Registrar the jurisdiction as is relevant there within. It was argued in that conferment the Chief Justice recognized the beneficial, superintendent roles the Judges hold over the Registrars- in managing litigations and to whom (the Judges) the Registrars are subordinate and made the application of the powers, functions and jurisdictions instructable by the Judges through directions.

It was the claimant's argument therefore that contrary to the view of the defence, the combined reading of Order 25, rule 1 (whole) and (n) and Order 12, rule 19 of CPR the Court therein empowered to assess damages (is that of)/ is the Court of the Registrar of High Court of Malawi and in that requires no prior (and thus redundant) mandate of a Judge of the Court.

Issue

In this application by the 2nd defendant, I am called upon to determine whether in terms of Order 25 rule 1(n) CPR, the registrar has jurisdiction to hear evidence for purposes of assessing the amount of damages, and make a determination of the amount of damages without prior direction from the Judge; and whether under Order 35 rule 6(3) CPR.

Analysis of Law and Fact

The Courts Act should be the first point of call. The office of the registrar, deputy registrars and assistant registrars is created in section 7. The registrar, and his deputies and assistant registrars under the superintendence of the registrar, are to exercise jurisdiction, powers and duties as the Chief Justice may by Rules prescribe- section 8 of the Courts Act. The Chief Justice is empowered by section 67 of the Courts Act to make rules for the courts. The Chief Justice made the Rules for the High Court which took effect on the 3rd of October, 2017, essentially replacing the Rules of the Supreme (RSC) which were then in use pursuant to section 29 of the Courts Act (before its amendment under Act Number 7 of 2017).

The CPR does provide powers and functions of the registrar in Order 25. It should be pointed out that under the RSC, a judge could proceed to assess damages payable and make an order from the evidence, after a finding of liability in personal injury cases such as this one. The registrar could also assess damages. Order 25 of the CPR has made it that the jurisdiction of the registrar is subject to the direction of a judge, who has been assigned that case. This is so because right after the issuing of the initial process, the summons, by the registrar, the case is assigned to a specific Judge by the Judge in Charge, by the Initial Directions (in Form 3) under Order 5 rule 19 of the CPR. The initial directions provide that the matter is before that judge and every future document filed in that case must bear that Judge's name beneath the case number in the caption, among other directions.

It is therefore a specific Judge assigned to a particular case that must preside over each and every application unless the judge delegates to the Registrar any matter falling within the matters in which the Registrar may exercise jurisdiction, power and functions of the Judge. It is my reading of Order 25 (1) CPR therefore that the CPR has taken away the automatic jurisdiction of a registrar in assessment of damages as well as all other types of proceedings listed under Order 25 of the CPR, in which under the RSC the Registrar may have had automatic jurisdiction.

Counsel for the defendant states that under Order 12 rule 19 CPR the rules talk about the court conducting the assessment of damages as a trial. Counsel uses that rule to argue that it is clear that only a Judge, which is the court has the power and jurisdiction to do assessment hearings as of right. Counsel cited other laws in his argument as I outlined above. The law cited by counsel does not expressly define 'court'. It is clear however, in my view, from a totality of the law cited, that the word 'Court' in the CPR refers to the High Court Judge. Order 12 CPR is concerned with ending a proceeding early as opposed to specifically making procedure for assessment of damages. The term 'Court' in that rule, in my view, refers to a judge who is assigned the case by a Judge-in-Charge. However, since a registrar can by the dictate of Order 25(1) exercise the powers and functions of the court, it would be absurd to read the court in that rule to exclude a registrar who, for instance is directed by the specific judge seized of that proceeding to do the assessment hearing and determination under the authority of that Order 12 as read with Order 25(1) CPR. It is my view that the registrar acting on the delegated powers and jurisdiction of a judge under Order 25 (1) CPR acts for, and as a Court.

The foregoing view also brings me to another point raised in prosecution of this objection by the defendant that an appeal of the registrar's decision lies to a Judge in chamber. My considered view is that it does not. It lies to the Supreme Court of Appeal. The registrar acting on the direction of a judge does so exercising not powers as a Registrar per se but as the High Court. His decision is that of the Court, on the reading of Order 25 (1) CPR. Perhaps that is even why the Registrar, on his own or on application by a party, is empowered to refer any question that he feels requires the 'proper' Court itself to attend to, under Order 25(2) CPR.

The High Court becomes *functus officio* after the decision of the registrar as delegated by the Court to exercise the Court's power or jurisdiction.

Returning to this case, it is my finding that the matter was commenced before the CPR was made operational, from the 3rd day of October, 2017, as such this is an existing proceeding under Order 35 rule 1 of the CPR. The proceeding was commenced by a writ of summons (specially endorsed) that was issued under the Rules of the Supreme Court. The defendant having not entered a defence within the prescribed time, the claimant obtained a default judgment, and subsequent orders thereafter came into effect. The very first default judgment that was entered in this case was endorsed by the court, through the registrar, on 2nd day of October, 2014. There were applications of stay and restoration in between. All these applications were before a registrar, understandably as the registrar had automatic jurisdiction to hear and determine those applications then coming under the Rules of the Supreme Court.

The Rules now in use, the CPR, has provision on how to deal with matters that were began before the rules took effect and are on-going after the coming into force of the rules. In this case the judgment entered was a default judgment, entered before the commencement of the CPR. It follows that the default judgment was taken under the RSC. Even if the claimant only caused the default judgment to be entered after the 3rd day of October, 2017, the date the Rules came into force by the appointment of the Chief Justice under Order 1 rule 2, CPR, the default judgment would still have been entered under the existing procedure rules, the RSC, under Order 35 rule 4 which reads:

Where a party wishes a judgment in default to be entered in an existing proceeding, he shall do so in accordance with the existing procedure rules.

The 2nd defendant does not expressly state it, but by inference I believe the 2nd defendant is of the view that Order 35 rule 6(3) should have applied when the claimant took a notice of appointment to have damages assessed. The said rule reads:

Where a new step is to be taken in an existing proceeding on or after the commencement date, it shall comply with these Rules.

I am left to consider whether the notice of appointment for assessment of damages is a step in a proceeding. The term 'step' in a proceeding is not defined in the Rules. In a matter commenced under these Rules, it would appear more appropriate to call an assessment of damages hearing a step in a proceeding. However, going by the fact that in an existing proceeding, the RSC would be the rules to apply for the step to cause a default judgment to be

entered, as under Order 35 rule 4 CPR, it is my view that assessment of damages is ancillary to the default judgment, and therefore the Registrar having had jurisdiction to make an order for a default judgment to be entered, cannot lose that jurisdiction to assess damages. I do not think that was the wisdom as intended by the drafters of these Rules for the transition from the RSC to these Rules, as regards default judgment.

I find nothing wrong with the claimant in this matter taking a notice of appointment to assess damages before the registrar, as that is applicable under the existing rules, namely the Rules of the Supreme Court. It would be helpful to note that even if the default judgment was not entered before the commencement date of the CPR, the 3rd of October, 2017, and the claimant wanted it entered after the commencement date, the default judgment would have been entered following RSC, under Order 35 rule 4, CPR. Assessment of damages being ancillary to the judgment, and with the existing procedure rules, the RSC, requiring no initial directions by a Judge-in-Charge assigning a case to a specific judge, as under the CPR now, it should follow, in my view that the Registrar should have jurisdiction to assess damages having had prior jurisdiction to enter a default judgment in the case.

Conclusion

The Registrar under Order 25(1) of the CPR can only exercise powers and jurisdiction of the Court if he has been directed by a judge assigned to that case to exercise that power. In this case however, in which judgment was by default of a defence, and which judgment was lawfully entered by the Registrar having jurisdiction from the RSC, the Registrar's jurisdiction cannot be deemed to have ceased, as assessment of damages follows from an order of the registrar himself.

I dismiss the 2nd defendant's application with costs to the claimant. The claimant is at liberty to obtain a fresh date of hearing for the assessment of damages.

Made this 19th day of October, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR