



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 2893 OF 2006

BETWEEN

P.M. KUMWENDA t/a KUMS CONSTRUCTORS CLAIMANT

AND

MR. F. KANJIRADEFENDANT

CORAM : HER HONOUR MRS. BODOLE, ASSISTANT REGISTRAR

Sitolo, of Counsel for the Claimant

Chimowa, of Counsel for the Defendant

Ms. Kazembe, Court Clerk

RULING

Introduction

The matter has been brought under order 6 rule 8 of High Court (Civil Procedure) Rules to remove the defendant as a party for misjoinder.

The Evidence

Both parties filed sworn statements in support of the application and also made oral submissions. Counsel for the claimant submitted that the claimant entered into a contract with the defendant's brother Mr. W. Kanjira for construction

services. The defendant's brother failed to pay for the service and the claimant commenced action against the defendant. The defendant's brother passed away on 13th October, 2010. After his death the claimant informed the defendant of the debt. The defendant paid the claimant the amount owed with an intention of keeping his brother's name clean. He also made the payment as a matter of being human knowing that his brother owed the claimant some money at the time of his death. Later on he discovered that the claimant had replaced his name with that of his brother as defendant yet the contract was between the claimant and the defendant's brother. The defendant did not obtain Letters of Administration for his brother's estate. As such, he cannot be made a defendant in an agreement that he was not party to or a deceased estate to which he is not the administrator.

The defendant, therefore, prayed to the court to be removed as a party for misjoinder.

The claimant's in his sworn statement testified that he indeed commenced an action against Mr. W. Kanjira Phiri on 26th October, 2017. Judgment in default of defence was entered on 5th January, 2007. The court issued a warrant of execution on 25th June, 2010. Mr. W. Kanjira Phiri passed away in October, 2018. After his death, the claimant consulted a Mrs. Monjeza who is a relative of the defendant as to who was responsible for managing the estate of the deceased. She said that she would consult her family. After a short period of time, she informed the claimant that their family had agreed that the defendant, who was running the business and other affairs of the deceased was the contact person. The claimant went to Balaka district where the deceased's house was and he found that the house had been turned into a lodge and it was being ran by the defendant. Upon confirming that the defendant was indeed running the deceased's affairs, the claimant's lawyers wrote a letter of demand to the defendant for the amount stated in the statement of claim. The defendant's lawyers had asked the claimant's lawyers through their letter of 24th January, 2012 for the court process against the deceased so that the defendant should consider settlement of the matter out of court. The defendant's lawyers replied through a letter dated 14th February, 2012 enclosing the court process to the attention of Mr. Malera who was handling the matter on behalf of

the defendant. After sending the letter, the claimant's lawyers did not hear anything from the defendant or his lawyers.

Since there was no response from the defendant or his lawyers, the claimant made an application to the court on 6th November, 2012 substituting the deceased with the defendant as a party to the action. The summons were served on both the defendant and his lawyers. There was no response or opposition to the summons and on 27th November, 2012 the court proceeded to hear the summons and on 24th December, 2012 the court made an order substituting the deceased with the defendant. The court order was sent to the defendant's lawyers, and again there was no response.

After the deceased was substituted with the defendant, the court issued a writ of *fieri facias* against the defendant dated 6th February, 2017. On the strength of the writ of *fieri facias* the defendant issued post-dated cheques to the Assistant Sheriff, Lilongwe in respect of his account with National Bank of Malawi. After the cheques were paid, there was incomplete execution and the claimant's lawyers filed a certificate of incomplete execution. The claimant then commenced garnishee proceedings against the defendant and Kamuzu Academy. The court entered a garnishee order against the defendant for a sum of K200,644.22.

In June, 2016 the claimant commenced proceedings to assess interest and there were several adjournment of the said proceedings. The defendant was aware of all these developments but no attempts were made to challenge the court processes. On 15th February, 2017 the court assessed interest in the claimant's favour. There was no opposition from the defendant and the defendant did not attend court even after being served with the court process. The court made an order for assessment of interest on 3rd October, 2017. An application for an Interim Third Party Debt Order was made and granted on 8th December, 2017. The order was served on both the defendant and Kamuzu Academy (Third Party). The defendant nor the Third Party nor their lawyers attended court on 12th December, 2017 although they were fully aware of the application. No statement of opposition was filed with the court to contest the proceedings.

The court granted a Final Third Party Debt Order and this was served on Kamuzu Academy. The defendant's lawyers obtained a court order staying execution of the Interim Third Party Order. The court erred in granting a stay order as the same was irregular and had been overtaken by the Final Third Party Debt Order of which the validity of the same has not been challenged up to-date.

The claimant further submitted that the order to substitute the deceased with the defendant has not been challenged for the past five years and no application was made to appeal against the said order substituting the deceased with the defendant as a party to the proceedings. The application by the defendant to be removed as a party for misjoinder is frivolous, vexatious and has no merit. It is aimed at denying the claimant the fruits of his litigation. The summons to remove the defendant as a party for misjoinder has no legal basis and should be dismissed with costs.

Applicable Law

It is trite law that a claimant who seeks relief must do so promptly. In ***Erlanger v New Sombrero Phosphate*** (1878) App. Cas 1218 p.1279 Lord Blackburn stated that

"...a Court of equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by".

A claimant is required to act promptly, diligently and equitably. In ***Lindsay Petroleum v Hurd*** (1874) LR 5 PC 221 p.239-40 (PC) Lord Selborne had this to say:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, wither because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise would be just, is founded upon mere delay, that delay of

course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important to such cases, are, the length of the delay and the nature of the acts done during interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Most recently in **Frawley v Neill** [2000] CP Rep. 20 CA Aldous LJ described the doctrine in similarly expansive terms. He stated that

"In my view, the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

From the above, it appears to this court that the most essential principle is that of practical injustice. Thus the court will refuse to give a remedy where it would be practically unjust to give one either because by the claimant's conduct he has waived the right to that remedy, or if he has not waived his rights, his delay has nevertheless prejudiced the other party. Factors to be taken into account as to delay were propounded in the case of **Nelson v Rye** [1996] 1 WLR 1378 (Ch) 1392 to include

"...the period of the delay, the extent to which the defendant's position has been prejudiced by the delay and the extent to which that prejudice was caused by the actions of the plaintiff."

Analysis of Facts and Applicable Law

Jurisprudence on this matter is well-settled. A party is said to have abandoned or waived his right where he has failed or neglected for an unreasonable and

unexplained length of time to do that which by exercising due diligence could or should have been done earlier. He is also said to have abandoned or waived his right where he neglected or omitted to assert a right within a reasonable time it would have taken the party entitled to assert it.

The defendant has taken about 6 years to assert his right that he is being sued as a wrong party. He had notice of the claimant's application to the court on 6th November, 2012 substituting the deceased with the defendant as a party to the action. He also had notice of the order of the court made on 24th December, 2012 substituting the deceased with the defendant. The defendant has neither challenged the order for the past 5 years nor has he made an appeal to challenge the order.

When the court issued a writ of *fieri facias* against the defendant on 6th February, 2017 the defendant issued post-dated cheques to the Assistant Sheriff, Lilongwe in respect of his account with National Bank of Malawi. After the cheques were paid, there was incomplete execution and the claimant's lawyers filed a certificate of incomplete execution. The claimant then commenced garnishee proceedings against the defendant and Kamuzu Academy. The court entered a garnishee order against the defendant for a sum of K200,644.22. The defendant was aware of these proceedings and did nothing to challenge the order.

In June, 2016 the claimant commenced proceedings to assess interest and there were several adjournment of the said proceedings. On 15th February, 2017 the court assessed interest in the claimant's favour. There was no opposition from the defendant and the defendant did not attend court even after being served with the court process. The court made an order for assessment of interest on 3rd October, 2017. An application for an Interim Third Party Debt Order was made and granted on 8th December, 2017. The order was served on both the defendant and Kamuzu Academy (Third Party). The defendant nor the Third Party nor their lawyers attended court on 12th December, 2017 although they were fully aware of the application. No statement of opposition was filed with the court to contest the proceedings. The court granted a Final Third Party Debt Order and this was served on Kamuzu Academy. The validity of the same has not been challenged up to-date.

The defendant was aware of all these developments but no attempts were made to challenge the court processes. In all this the defendant chose to take no action but to sleep on his rights and thus delayed in asserting his rights. The defendant is, therefore, taken by this court to have abandoned or waived his rights.

The defendant's delay in asserting his rights have prejudiced the claimant. The defendant took steps to settle the debt when he was made a party to the action. There is a Final Third Party Debt Order against the defendant which has not been challenged and is still standing.

The defendant cannot belatedly raise a protest against matters which have become long ago settled, final and binding. He cannot be allowed to benefit from his inaction and neglect for an unreasonable length of time, by the simple expedient of bringing this application. Due to his inexcusable neglect, the defendant should be barred from asserting this claim at all, because to allow him to do so would be inequitable and unjust to the claimant.

Finding

This court, therefore, finds that the defendant, by his actions, abandoned and waived his rights. This court also finds that the defendant's delay has prejudiced the claimant. The application by the defendant to be removed as a party for misjoinder is frivolous, vexatious and has no merit. It is aimed at denying the claimant the fruits of his litigation.

Conclusion

The application to remove the defendant as a party for misjoinder is dismissed with costs to the claimant.

Made in chambers this 11th day of June, 2018 at Blantyre.


E. BODOLE (MRS)

ASSISTANT REGISTRAR