



IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NUMBER 449 OF 2014

BETWEEN

THOKO TEMANI.....CLAIMANT

AND

MWAIWATHU PRIVATE HOSPITAL.....DEFENDANT

Coram

Honourable Jack N’riva Judge
Mr S Mumba of counsel for the claimant
Ms C Nyemba of counsel for the defendant
Ms D Mtegha Court Clerk

RULING

(APPLICATION TO RE-AMEND STATEMENT OF CLAIM)

Background

The claimant commenced this action against the defendant claiming negligence on the part of the defendant. The particulars of negligence, among other issues, were that that the doctors of the defendant were negligent in treating the claimant after she suffered some injuries on her fingers following an attack on her by thieves. After being attacked she went to Mwaiwathu hospital. After the treatment, she suffered some further problems. We have heard the evidence in the matter pending the final determination of the matter.

Counsel for the claimant, Mr Mumba, made an application to re-amend the particulars of the claim in this matter. The essence of the re-amendment is to integrate negligence by nurses as a particular of the claims.

Opposition

Counsel for the defendant, Ms Nyemba, opposed the application. She raises these points:

1. The application does not cite the law under which it is made.
2. The application goes against the overriding principles of the civil procedure rules.
3. The application had been made late.
4. It would be unjust to grant the application at this point.

Arguments

The claimant relies on *NICO General Insurance v Chiwaya* [2008] MLR 240. This decision held that the court has wide discretion to allow amendments to pleadings at any point in trial of a matter.

Counsel argues that the re-amendment is simply recasting or amplifying issues that were already given as evidence in the matter.

Ms Nyemba argues that the application goes against active case management as one of the overriding objectives under order 5 rule 1 of the Civil Procedure Rules. Counsel argued the claimant is raising a new issue at this point when the trial has come to a conclusion. Counsel argues that initially the allegation of negligence was against the doctors and now the intended amendment aims at shifting the issue of negligence to nurses. She said the defendants were proceeding based on the allegation of negligence against the doctors. The re-amendment is not merely aimed at clarifying the issues but bringing in new issues altogether. The defendant would be prejudiced by the re-amendment as the defendant had no opportunity to cross-examine witnesses on the issue. Counsel further argues that *NICO v Chiwaya* was based on old rules of procedure. Counsel preferred the approach taken by Hon Katsala J in *Mike's Trading v NBS Bank* Commercial Cause No. 78 of 2014 in which the Court held that courts do not have to allow amendments anyhow: the courts will be reluctant to allow amendments that change the landscape of litigation.

In response, Mr Mumba argues that the matter arose before the introduction of Civil Procedure Rules. further to that counsel argues that the issues of nurses'

negligence is not new to this trial as it was reflected during the cross examination of the witnesses. Counsel further argued that while the *Mike's Trading* decision is one of the High Court, *NICO v Chiwaya* is a Supreme Court decision and binding on this Court. Further, *NICO v Chiwaya* is a personal injury issue, while *Mike's Trading Group v NBS Bank* is a commercial matter based on High Court (Commercial Division) Rules, 2007.

Issue

The issue for determination is whether to allow the re-amendment at this point when the parties have given evidence and closed their respective cases.

Discussion

In resolving the matter, I will take the approach adopted by the parties in the matter. The parties have dwelt a great deal on the issue of precedent.

Ms Nyemba wants the court to disregard *NICO v Chiwaya* and depend on *Mike's Trading Group v NBS Bank*. Her argument is that the *Mike's Trading Group v NBS Bank* is based in the current regime of the rules of procedure while *NICO v Chiwaya* is based on defunct procedural rules. Mr Mumba wants the Court to follow *NICO v Chiwaya* because it was personal injury matter whilst *Mike's Trading Group v NBS Bank* was a commercial based. *Mike's Trading Group v NBS Bank* was based on Commercial Rules.

NICO v Chiwaya was based on Rules of the Supreme Court were the rules of procedure in England until 1998. The rules were also of application to Malawi by virtue of section 29 of the Courts Act. From 1998, England civil procedure rules are now governed by the Civil Procedure Rules.

The case of *Mike's Trading* was based on High Court (Commercial Division) Rules, 2007. Both the Civil Procedure Rules, 1998 and High Court (Commercial Division) Rules, 2007 moved away from some procedural aspects of Supreme Court Rules. Both the Civil Procedure Rules, 1998 and High Court (Commercial Division) Rules, 2007 outlines overriding objectives one of whose principles is to identify issues in dispute at an earliest opportunity. This is under the overriding objectives as well as the principle of active case management.

From October 2017, the High Court, in all the divisions except the Criminal Division, follows procedure under the Courts (High Court) (Civil Procedure) Rules. These rules make reference to active case management.

Active case management includes, among several other aspects, identifying issues for resolution at an early stage and deciding which issues require full investigation by the court- Order 1 Rule 5 of Courts (High Court) (Civil Procedure) Rules.

Katsala J in *Mike's Trading Group v NBS Bank* makes some apt points and observations under the modern approach to civil procedure rules.

One observation the Honourable Judge makes is that parties must frame their cases concisely and at an early opportunity; that the Courts will be increasingly reluctant amendments that change or redefine issues.¹ The Judge observes that to allow amendments that redefine the issues would be to go against the overriding objectives of civil procedure rules of active case management.

Guided by the new rules of procedure, we have to consider whether an amendment or indeed any other proceeding would enhance the objectives of the Rules and more especially active case management. It can no longer be the case that we can grant an amendment at any point so long a party can compensate the other party with costs. That 'cannot be supported the overriding objective and the courts will do well in letting go of [the principle of allowing amendment at any point] and embracing the modern approach' –Katsala J, *Mike's Trading Group v NBS Bank* p 14.

The new procedural rules require that we start doing civil litigation, case management and adjudication differently from what we have been doing before.

Finding

Having discussed the case law on the subject, I feel more inclined to follow *Mike's Trading Group v NBS Bank*. This is because that makes reference to modern procedural rules regardless of the fact that it was a commercial matter. Although *NICO v Chiwaya* was a personal injury matter, the approach in that matter is not the approach that is concomitant with the new procedural rules.

The approach in *Mike's Trading Group v NBS Bank* is the one that the courts ought to follow in the light of the new procedural rules.

To allow the re-amendment at this point would prejudice the defendant. This is because crucially at the start of the matter the claimant specifically alleged negligence but not on the part of the nurse(s). Neglibemce on the part of nurses

¹ Page 9

is a new issue altogether. To amend the statement of case in the manner the claimant is proposing to alter the landscape of the whole claim all together.

We cannot disregard the principles under the Courts (High Court) (Civil Procedure) Rules merely on the ground that the claimant commenced the matter before the Courts (High Court) (Civil Procedure) Rules. Order 35 Rule (6) 7 of the Rules enjoins Courts and parties to employ active case management to existing proceedings. This means that the new rules have to apply even to existing proceedings.

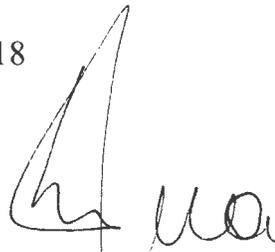
Conclusion

The current approach to litigation is to actively manage cases. Under these rules there is need to identify issues at an early stage. Amendments cannot be allowed anyhow.

In this matter, the amendment that claimant seeks is not just a case of making clarification. It is an amendment that goes to the root of the claim in the matter. The re-amendment that the claimant intends to make, is an amendment that changes the whole claim all together. To allow the at this stage, when the parties have finalised giving evidence, would prejudice the defendant's case. Therefore, I dismiss the claimant's application to amend the statement of claim.

As I directed before, the parties will have to file their submissions within the next fourteen days.

Delivered the 28th day of May, 2018

A handwritten signature in black ink, appearing to read 'J N'RIVA', written in a cursive style.

J N'RIVA

JUDGE