



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2134 OF 2007

BETWEEN:

JIMMY CHINGWALU.....APPLICANT

AND

TRANSCOM.....DEFENDANT

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Chisama, of Counsel for the Applicant

Mr Mpaka, of Counsel for the Defendant

Mrs Phombeya, Official Interpreter

RULING

Kalembera J

By Notice of Originating Summons the Plaintiff commenced this action against the Defendant seeking the following Declarations and Orders:

1. A declaration that the plaintiff should be rewarded R50,000 or its equivalent in Malawi Kwacha.
2. A declaration that the plaintiff fulfilled conditions and accepted the offer by the defendant.
3. An order for Specific Performance to the defendant and its responsible agents and servants that the defendant hands over the **REWARD**.
4. An order that costs of this cause is for the defendant.

The summons is supported by an affidavit sworn by the plaintiff himself as well as skeletal arguments.

Before the hearing of the Originating Summons, the Defendant filed a Notice of Preliminary Objection that the matter herein should not have been commenced by Originating Summons as there are a number of factual issues in dispute.

The main issue for the court's determination is whether this matter was properly commenced by Originating Summons or ought to have been commenced by Writ of Summons.

Order 5, rule 2 of the Rules of the Supreme Court (RSC) provides as follows:

"O.5, r.2 Subject to any provisions of an Act, or of these rules, by virtue of which any proceedings are expressly required to be begun otherwise than by writ, the following proceedings must, notwithstanding anything in rule 4, be begun by writ, that is to say, proceedings –

- (a) in which a claim is made by the plaintiff for any relief or remedy for any tort, other than trespass to land;*
- (b) in which a claim made by the plaintiff is based on allegation of fraud;*
- (c) in which a claim is made by the plaintiff for damages for breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision) where the damages claimed consist of or include damages in respect of the death of any person or in respect of personal injuries to any person or in respect of damage to any property.*
- (d) In which a claim is made by the plaintiff in respect of the infringement of a patent."*

And Order 5 rule 4 provides as follows:

"O.5, r.4 (1) Except in the case of proceedings which by these rules or by or under any Act are required to be begun by writ or originating summons or are required or authorized to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) Proceedings –

(a) in which the sole or principal question at issue is, or is likely to be one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or

(b) there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ.”

In the matter at hand Counsel for the Defendant argues that this matter ought to have begun by writ of summons since there are factual issues in dispute relating to amounts of money offered if the Defendant's truck was found through any information from the public. The Defendant contends that it offered K40,000 reward which was duly given to the plaintiff. Whereas the plaintiff contends that ZAR50,000 which he is claiming, is what was offered as a reward. Hence, the Defendant submits that it would be necessary to cross-examine the Plaintiff on the basis of his claim, and that, that can only be done if the matter was commenced by writ of summons.

Counsel for the Plaintiff insists that there is no complexity in this matter since the Defendant admits putting a notice of reward leading to recovery its vehicle. The Defendant should have a record of the said notice. Hence, Counsel for the Plaintiff insists that the matter should proceed as commenced.

I must agree with Counsel for the Defendant. There are indeed factual disputes, and I take these to be substantial disputes of fact. The Plaintiff claims that the Defendant offered a reward of ZAR50,000, whereas the Defendant claims that it offered a reward of MK40,000 for the recovery of its vehicle, which amount was duly paid to the Plaintiff. There is need to resolve this dispute, and determine whether the Defendant offered a reward of ZAR50,000 or MK40,000; and whether the Plaintiff was fully paid the said reward. There would indeed be need for evidence and cross-examination of the Plaintiff and any other witnesses, if at all, to come to the bottom of the issue.

And in accordance with O.5, r.4 (2)(b) of the RSC, since there are substantial disputes of fact, this matter ought to have been commenced by writ of summons. I therefore order and direct, this matter should continue as if the same had been commenced by writ of summons. I so order.

Costs be in the cause.

PRONOUNCED this 8th day of August 2019, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE