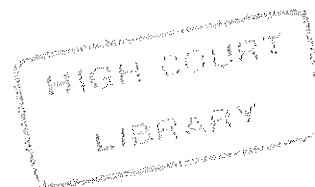


REPUBLIC OF MALAWI



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 682 OF 2017

BETWEEN:

LEONARD YANKHO PHIRI AND OTHERS .....CLAIMANTS

AND

LILONGWE CITY COUNCIL.....1<sup>ST</sup> DEFENDANT

LILONGWE WATER BOARD.....2<sup>ND</sup> DEFENDANT

MALAWI HOUSING CORPORATION.....3<sup>RD</sup> DEFENDANT

CORAM: A.P KAPASWICHE

ASSISTANT REGISTRAR

Katundu/ Singini/ Phombeya For the claimants

Songea For the 1<sup>st</sup> defendant

Mzanda For the 3<sup>rd</sup> defendant

Kumwenda Clerk/ Official Interpreter

## RULING

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### BACKGROUND

The matter came before this court for assessment of damages on the 1<sup>st</sup> day of July 2021 following a judgment of the court that found the 1<sup>st</sup> and 3<sup>rd</sup> defendants liable on the claims brought by the claimants. On 4<sup>th</sup> June 2021, the 3<sup>rd</sup> defendant filled a notice of preliminary objection on the basis that there are additional claimants that filled witness statements on assessment when they were not on the original list of claimants when the summons were being filled. This application was supported by a sworn statement by Counsel for the 3<sup>rd</sup> defendant and skeleton arguments were also filled. The claimant's respondent orally at the hearing and the 1<sup>st</sup> defendant also made an oral application meant to be an extension to the 3<sup>rd</sup> defendants' application which was also orally responded to by the claimants. The 1<sup>st</sup> defendant argued against inclusion of claimants that were being represented by Counsel Chembezi as they did not prove their case in court. This ruling, therefore, deals with the preliminary objections in question.

### SUBMISSIONS

Counsel Mzanda argued that when commencing the present proceedings, they a list of all the claimants as being a party to the present proceedings as required under **Order 6 rules 1 and 3 of the Court (High Court) (Civil Procedure) Rules 2017**. Having been served with the witness statements of the claimants for assessment of damages, the 3<sup>rd</sup> defendant noted that there are included witness statements of people that were not listed in the summons. The 3<sup>rd</sup> defendant exhibited the original list filled when filling the claim as well as the list of the additional names included on assessment and not catered on the original list. It was argued that it is not only improper for the claimant's lawyers to add parties to the action at this stage in this manner but also unjust and unfair to the defendants as it creates ambiguity as to which parties they are dealing with. The submission was that the additional people who were not listed as parties to the action in the summons should not be party to the assessment proceedings.

In response to the first objection stated above, Counsel Katundu argued that the list attached to the summons was titled list of “affected families” and not affected individuals. The witness statements have included names of all the members of the families hence the reason why there are additional names not provided for on the original list. Counsel Phombeya raised an issue on why the defence is bringing the issue at this stage when the summons were served a long time ago hence if the defence had issues with the list of the claimants they could have raised the issue a long time ago.

In reply, Counsel for the 3<sup>rd</sup> defendant argued that Order 6 rule 1 and 3 requires that each and every party to a case has to be named separately and not lumped together to avoid ambiguity and to ensure that the defendants know which party they are dealing with. Counsel argued that it was not a problem for the claimant’s lawyers to include all the names of the individual family members when commencing the proceedings. On concerns raised by Counsel Phombeya, the reply was that the present objection could not have been brought earlier on as the additional names have just been added on the assessment.

Counsel Songea raised two issues. The first issue was that the original list has a space where no names have been indicated and the only thing indicated is the house number. The argument was that legal persons are the ones that are supposed to be parties to a case the house number should not be counted as representing a party. The second issue was that the defence was served with witness statements from Messrs Liwimbi & Partners. The file will show that there was consolidation of matters as Liwimbi had commenced an action arising from the same facts and it was held that the two claimants be joined in one case hence the two matters were consolidated. Counsel Songea argued that the Liwimbi & Partners were not available on the day of trial and that the Judge gave a direction that all claimants should prove their case and due to their absence, clients of Liwimbi & partners failed to prove their case hence they should not be included on assessment. In response, Counsel Katundu argued that the approach adopted at trial was that only 8 claimants testified and these 8 represented the whole group of claimants hence it is illogical to say that the group originally represented by Liwimbi did not prove their case. It was argued that since the matter two

matters were consolidated into one file then the 8 witnesses represented all the claimants the available lawyers in court are representing all the claimants.

### **THE LAW**

The relevant law on the present dispute is under Order 6 of the CPR 2017. The order provides as follows;

### **PARTIES**

1. Subject to rule 15, a person is a party to a proceeding if he is named as a claimant or as a defendant.
2. There may be more than one claimant, and more than one defendant in the same proceeding.
3. Each party to a proceeding shall be named separately.
4. 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.
5. 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.
6. A person may be added as a claimant in a proceeding with his consent and where the person does not consent to be added as a claimant, he shall be added as a defendant.
7. A person affected by a proceeding may apply to the Court for an order that he should be added as a party in the proceeding.
8. The Court may, on an application by a party, order that a party in a proceeding is no longer a party where-
  - (a) the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding; or
  - (b) there is no good and sufficient reason for the person to continue being a party.

### **ANALYSIS OF THE LAW AND SUBMISSIONS**

**Order 6 (3) of the CPR 2017** provides that each party to a proceeding shall be named separately. This rule, in my understanding, is very clear and one cannot interpret it to mean that the law allows parties to a case to be identified as families or households. **Under Order 6 (4) of the CPR 2017**, a person can only be added as a party to a proceeding without the permission from court only before the summons are served by endorsing that person's name on the copies of the summons. Other than following the provision under Order 6 (4), a party cannot be added to a case without making a proper application to a court. In the present case, the application made by the 3<sup>rd</sup> defendant makes much more sense and has to be granted by this court. Having already served the summons to the defendants, the claimants cannot add other claimants to the case without an application for the same being made before the court.

The argument of using families to identify claimant's does not have a legal basis as Order 6 (3) clearly requires that each party to a proceeding be named separately and not through families. Again, a party to a proceeding cannot be identified through just listing a mere house number as a house number is indeed not a legal person. This court, therefore, holds that all the names that were not listed during the time of commencement of the present matter be struck off the assessment list as they are not parties to the present case. I further order that the identification of a party using a house number is irregular as it has no legal basis hence this will not be counted as a claimant. I will not dwell much on the issue raised by Counsel Phombeya on the timing of bringing the present objection at this point on the part of the 3<sup>rd</sup> defendant. I agree with the 3<sup>rd</sup> defendant's response to the issue as they could not be expected to raise the objections earlier on as the additional names have appeared on assessment of damages stage hence this is the appropriate time to bring the objection.

The record shows that there were originally two claims against the defendants as the claimants were in two groups; the first group being represented by Kita & Company as well as Khonyongwa & Associates while the other group was being represented by Liwimbi & partners. These two matters were consolidated into one matter and at trial, the approach was that only 8 claimants will be selected to testify on behalf of all the claimants in question in the

consolidated matter. Having had this background in mind, the argument from Counsel Songea that the group that was originally being represented by Liwimbi should not be part of the claimants at this stage is an argument that lacks merit. The matter, as was rightly observed by Counsel Katundu, was consolidated meaning that it was one matter. The 8 witness that testified during trial represented all the original claimants from the consolidated case. I, therefore, dismiss the objection raised by the 1<sup>st</sup> defendant with regard to the objection stated above.

Pronounced this 3<sup>th</sup> day of JULY 2021 at LILONGWE



ANTHONY PITHILIZANI KAPASWICHE

ASSISTANT REGISTRAR