



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 629 OF 2015

BETWEEN

VICTOR MBEWE.....CLAIMANT

-AND-

MACLEAN NG'OMA.....1<sup>ST</sup> DEFENDANT

REAL INSURANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

**Coram:**

**Brian Sambo, Assistant Registrar**

Mr. Sitima, of counsel for the "Receiving Party"

Mr. J.S. Banda, of counsel for the 'Paying Party'

Mr. Kumwenda, Official Interpreter/ Law Clerk

### **RULING**

Counsel for the receiving party filed his bill of costs on the 9<sup>th</sup> of September, 2021. He titled his bill, 'The Claimant's Bill of Costs to be assessed as Party and Party Costs Pursuant to the Judgment Dated 24<sup>th</sup> June, 2019 and Ruling Dated 23<sup>rd</sup> October, 2019'.

Now counsel for the paying party raises a preliminary objection to the effect that the receiving party had offended the provisions of Order 31 rule 12(1) of the Courts (High Court) (Civil Procedure) Rules, 2017 by failing to file the bill of costs

within 3 months. He said the said provision allowed counsel to file an old bill but with leave of the court. He therefore submitted that since the receiving party had filed its old bill of costs without leave of the court, the same should not be assessed but thrown out with costs.

In response, counsel for the receiving party said it was not true that the bill was filed outside the 3 months. He said that Order 31 of the CPR, 2017 required that the bill should be filed at the conclusion of the whole proceedings, unless the court orders otherwise. He said even though the order of assessment in this matter was made on 23<sup>rd</sup> October, 2019, the proceedings were still live as the Claimant was still chasing payment through various modes of execution. He said, as things stood, the 1<sup>st</sup> Defendant was still owing the Claimant the sum of MK4, 617,312.50 of the judgment debt, and there was a pending application before the court for an enforcement hearing against the 1<sup>st</sup> Defendant. He went on to state that there was a Consent Order in Civil Cause Number 766 of 2020, *Maclean Ng'oma vs Britam Insurance Limited and John Suzi Banda t/a JB Suzi and Company* which the Defendant had failed to mention in their preliminary objection. He said in that case, the 1<sup>st</sup> Defendant sued the 2<sup>nd</sup> Defendant and the Defendant's lawyers for professional negligence arising out of the Defendants' conduct in this matter. He said the Defendants settled the matter and in paragraph 4 of the Consent Order settling the matter dated 26<sup>th</sup> July, 2021, the 2<sup>nd</sup> Defendant and Messrs JB Suzi and Company consented to the effect that the Defendants would pay the Claimant in the case of *Victor Mbewe vs Maclean Ng'oma and Real Insurance Company Limited*, Civil Cause Number 629 of 2015 party and party costs on behalf of the Claimant, and that the same would be assessed if not agreed by the parties. He further stated that, by the 26<sup>th</sup> of August, 2021, the 2<sup>nd</sup> Defendant knew that it had the obligation to pay the Claimant costs. He said there were further discussions along the way with the 2<sup>nd</sup> Defendant but the same failed, and this was what had necessitated filing of the present bill of costs, following the said consent order. He said it was strange that the 2<sup>nd</sup> Defendant was now trying to hide under Order 31 rule 12(1) of the

CPR, 2017. He submitted that the Consent Order dated 26<sup>th</sup> August, 2021 was an acknowledgment, and counting from that time, it could not be more than 3 months. He submitted that the Defendants' preliminary objection was as dishonest as it was legally and factually unsound. He prayed that the same should be dismissed with costs.

Counsel for the paying party returned to reiterate the point that bills of costs were filed on the basis of a relevant matter. He said, it was unknown to the law on assessment of costs for a party to rely on consent orders entered on different matters altogether as a basis for filing a bill of costs in another different matter. He said both the parties and the case number of the matter on which consent was drawn were different from the case cited in the bill. He said counsel for the receiving party had filed his bill on the basis of the case of *Victor Mbewe vs Maclean Ng'oma and Real Insurance Company Limited*, Civil Cause No. 629 of 2015. That the consent order being referred to by counsel for the receiving party was in the case of *Maclean Ng'oma vs Britam Insurance Company and John Suzi Banda t/a JB Suzi and Company*, Civil Cause Number 766 of 2020.

Counsel for the receiving party resurfaced to make a further response that even if the consent order was entered in a different matter, it still made reference to the matter at hand, and the 2<sup>nd</sup> Defendant had undertaken to pay the Claimant as consented, and that if not paid, the same should be assessed by the court, and that was why he had filed the present bill of costs.

To begin with, it is true as observed by counsel for the paying party that, according to Order 31 rule 12(1) of the CPR, 2017 a bill of costs is supposed to be filed within 3 months from the time an order for costs was made. It is also true as observed by counsel for the receiving party that such a bill has to be filed at the conclusion of proceedings or as directed by the court.

According to counsel for the paying party, 3 months expired in 2019, as proceedings, according to him, were concluded in 2019. The other party's view is that proceedings were concluded in August, 2021 when a consent order was

entered by the parties in Civil Cause No. 766 of 2020. At the same time, counsel for the paying party opposes the stated connection as it was a different matter altogether.

With regard to the term “proceeding”, my view is that even enforcement proceedings suffice to be ‘unconcluded proceedings’ to the effect that a party filling a bill may make reference to them on the fact that the proceedings were still pending for purposes of filing a bill of costs. On this point, I would still agree with counsel for the receiving party that, because there is a pending application for an enforcement order, filing of a bill of costs way after the conclusion of assessment of damages should not be regarded as offensive to the law providing for assessment of costs on the issue of time limit– Order 31 r 12 (1) of the CPR, 2017. In the same vein, I could still observe that, in the absence of pending court proceedings, a bill of costs would be good if it is only filed within 3 months from the time an order for costs was made and/or at the conclusion of the whole proceedings unless the court orders otherwise. Counsel for the receiving party also stated that the 1<sup>st</sup> Defendant was still owing the Claimant some judgment debt. My view is that a judgment debt by itself does not suffice as court proceeding. My view is that there has to be live or pending proceedings on the matter in the same court. The provision has not singled out particular proceedings, all it cares is that the bill of costs should be filed within 3 months from the time an order of costs is made and that it should be filed at the conclusion of the whole proceeding unless the court orders otherwise.

Now, if this should be the position, I do not think that the bill herein has been filed outside three months. I have inspected the pending application for an order of enforcement. May be the question would be, why has the receiving party decided to file the said bill of costs, without an application to file a bill of costs before proceedings are concluded? Order 31 rule 12(1) and sub rule 2 of the CPR, 2017, which I now reproduce, for the avoidance of doubt, reads as follows;

*12.—(1) A bill of costs shall be filed with the Court for assessment within 3 months from the date of the costs order and the bill shall be filed at the conclusion of the whole proceeding unless the Court orders otherwise.*

*(2) A party may apply to the Court to file a bill of costs before the conclusion of a proceeding or for an extension of time for filing of the bill under sub rule (1).*

From the provision above, it is obvious that in order to file a bill before proceedings are concluded, there has to be an application to do so. Thus having found that enforcement proceedings pending before the court suffice for purposes of computing time under Order 31 rule 12(1) of the CPR, 2017, counsel for the receiving party cannot rely on this provision having filed the bill before the proceedings are concluded without an application.

Coming to the issue of the Consent Order of August, 2021 in Civil Cause No. 766 of 2020, I would agree with the receiving party that, despite it having been entered in a different matter, it suffices the basis for filing this bill. Again, it suffices the basis for computing time within which a bill of costs could be filed in a court of law as disposes Order 31 rule 12(1) of the CPR, 2017. The consent was entered on 26<sup>th</sup> July, 2021, and the bill of cost was filed on 9<sup>th</sup> September, 2021, which was right within a period of three months.

I do not agree with counsel for the paying party that because parties consented in a different matter; with a different case number, it could not form the basis for filing the present bill of costs. One, because the consent order is now an order of the court, and if the court had seen it possible, none of the parties could retract it at this point. Two, the paying party, pended its signature on the consent thereby accepting all of its contents; by trying to disassociate itself from the contents of the consent or make, it would be a manifestation of nothing short of dishonesty and an abuse of the process of court on its part. A party would not be allowed to use the process of the court to deceive another. Therefore, the paying party cannot be allowed at this time to benefit from its own legal gambit

and deception at the expense of another. Three, the parties on the matter upon which a consent was entered are, almost the same; this the court can take judicial notice of. As such, it is not strange that the parties made reference to the matter upon which the bill was filed by the receiving party. Fourth, the bill was filed out of a matter not from abeyance; it was expressly mentioned and referred to in the consent order. Fifth, the paying party did not object to the authenticity of the consent order referred to by the paying party.

Admittedly, the receiving title given to the bill of costs by the receiving party is a bit misleading in that it only refers to the judgment dated 24<sup>th</sup> of June, 2019, and the ruling dated 23<sup>rd</sup> October, 2019 both of Civil Cause Number 629 of 2015. He should have also made a bit of reference to the said consent order and case number just to highlight the origin and provenance. I noticed in the background of the filed bill, counsel briefly, talked about the agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant on costs without necessarily coming out clearly on the effect of the said consent order. This omission is not offensive in view of the overriding objective under Order 1 rule 5 of the CPR, 2017. The omission could still be cured under Order 2 rule 3 (d) of the CPR, 2017, and I so deem the bill of costs to be effective.

The preliminary objection by the paying party cannot, therefore, stand. I dismiss it with costs to the receiving party.

Made in chambers today, Monday, the 22<sup>nd</sup> of November, 2021.

Brian Santho

Assistant Registrar.