IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1412/93

BETWEEN:

KENNETH M'MADI ..... 1ST PLAINTIFF

MANGAKA SIKWEYA ..... 2ND PLAINTIFF

and

MALDECO FISHERIES ..... DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Dokali, Counsel for the Plaintiff
Hanjahanja, Counsel for the Defendant
Ndalama (Mrs), Court Clerk

ORDER

By a summons of 29th November, returnable on 22nd December, 1993, the defendant, Maldeco Fisheries Limited, sought to strike out the plaintiff's, M'madi's and Sikweya's, statement of claim because it was an abuse of the process of the court. The first ground was that, in as much as the plaintiffs were suing on separate contracts of employment and, each case will depend on its own merit, the plaintiffs could not institute a representative action. The other ground was that, taken severally, each claim was for K145-00, the action should not have been commenced in the High Court. I heard the application on the 22nd of December 1993. I reserved ruling.

This action was commenced by the two plaintiffs on the 19th of October 1993. The plaintiffs brought the action "on behalf of themselves and on behalf of and as representing and for the benefit of all the persons interested and dismissed by the defendant on the 10th of May 1993". The plaintiffs, together with other 118 persons, were employed by the defendant as fishmongers at a salary of K145.00 a month. On 10th of May, 1993, all of them were dismissed. The action is to claim damages, one month salary in lieu of notice, for the 120 employees. The Statement of Claim was served with the writ.

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There was a notice of intention to defend. Immediately the defendant took out this summons to strike out the statement of claim and prayed, in the interim, that further proceedings be stayed. The two questions before me are, first, whether the two plaintiffs here can properly take out representative action and, second, whether in lumping these several minute claims and bringing the matter to the High Court, the plaintiffs are guilty of abuse of the process of the Court. I answer both questions in the negative.

On the first question, there is abundant authority to the effect that where, like here, reliance will be had on contracts entered severally and individually and where, so to speak, individuals were pursuing individual obligations, there is no common interest or right to justify a representative action. Counsel for the defendant relied heavily on the earlier case of Markt and Company Limited v. Knight Steamship Company Limited [1910]2 K.B. 1021. He did not refer, and I would think deliberately, to Irish Shipping Ltd. V. Commercial Union Assurance Company plc [1893]3 All E.R. 853. In the former case a representative action was disapproved, in the latter it was upheld. The latter case, without derogating an inch from the principle enunciated in the earlier decision, was distinguished. Both were decisions of the Court of Appeal.

In Markt and Company Limited V Knight Steamship Company Limited several shippers board the steamship Knight Commander sued for damages to goods when she was attacked by Russian ships. A representative action was disapproved because each shipper was serving his individual interest to have his goods shipped on an individual contract. Lord Justice Vaughan Williams said:

> "I find no such common purpose between the shippers. The purpose of each shipper was to forward his individual goods by a general ship to various destinations".

Lord Justice Fletcher Moulton rejected the action because, he thought, a representative action cannot be taken on a claim for general damages. Lord Justices Vaughan Williams and Fletcher Moulton threw out the action and refused amendment Lord Justice Buckley dissented. He thought the writs could be amended.

Markt and Company Limited V Knight Steamship Company Limited was considered by the same Court in Irish Shipping Limited v. Commercial Union Assurance Company plc. The latter case involved defendant insurers. The insurance cover was negotiated on terms which included

a leading underwriter clause whereby "the insurers agreed that all settlements of claims or contestations whatsoever .... by the leading underwriter will be binding upon all underwriters' and that they would be liable for their respective share for all decisions taken against the leading underwriter". These clauses are the lynchpin in the Court Appeals dismissal of the insurers appeal against the approval of the representative action. Irish shipping Limited v. Commercial Union was distinguished on this score. Lord Justice Staughton said at page 865:

> "So there were here 12 contracts, one by each of the underwriting agents and the insurance companies which signed on their own. But all 12 were on identical terms, save for the individual proportions of the risk. And to my mind the leading underwriter clause can be taken to provide that, at least for some purposes, they are to be considered as one contract."

Lord Justice John Megaw was more piquant:

> "The acceptance by all concerned of that clause as a term of each contract provides a vital distinction from the decision in Markt and Company Limited V Knight Steamship Company Limited ...."

Lord Justice Purchase said:

> "... and the present case is distinguishable by reason of the leading underwriter clause agreed to by all the class".

Where, therefore, reliance is had on separate contracts entered severally by individuals, common grievance or wrong does not provide a common right or interest for purposes of a representative action. It must be shown that there was a common interest among those involved in a representative action. There is a direct authority for cases where the claim is for price of work or labour, as is the case here, and the application was refused (Walker v. Sur [1914]2 K.B. 690).

In Markt and Company Limited V Commercial Union, Lord Justice Fletcher Moulton thought that a representative action could not be had for a claim for general damages. From the statement of their Lordships in Irish shipping Limited V Commercial Union, this is no longer the position.

In this case the class comprises of several employees. They reached separate contracts with the defendant. Each one of them has an individual claim for his salary. He has no interest in the salary of the next person. On the authorities as I have read them, and a considerable number are reviewed in Irish Shipping Limited v. Commercial Union, the representative action here cannot stand.

Should the statement of claim be struck out, therefore? In Markt and Company Limited V Knight Steamship Company Limited, two of their Lordships thought the writ was so bad that it could not be amended. They struck off the action. One member thought it could be amended. In this case it is important to remember that the striking out is based on the action being an abuse of the process of the Court. I do not think a man is abusing the process of the court who erroneously thinks he can bring a representative action. Mr. Hanjahanja, appearing for the defendant, further argued that there was an abuse of the process of the court because the plaintiff had lumped the claims together in order to obtain costs at a High Court scale. The submission is unfair. In the first place, there is no basis for such an imputation. Secondly, it must always be understood that our Constitution gives unlimited original jurisdiction to the High Court. It is only by statute that part of this jurisdiction is shared with subordinate courts (as defined by the Constitution). The effect of the statute creating subordinate courts is not expressly to ouster the original jurisdiction of the High Court. The High Court, however, regulates its devolved jurisdiction by the power to transfer or at the peril of costs. If a party commences a civil suit in the High Court which should have been commenced in the Subordinate Court, he is not abusing the process of the court because the law allows him to. Counsel when taxed, could not proffer any authority for holding that this would amount to an abuse of the process of the court. I have found none. Of course, there is the case Hobbs V Harlowe [1977]2 All E.R. 241. That was the case where the plaintiff, entitled to less, inflated the claim in order to have costs on a higher scale. The Court held that there was an abuse of the process of the Court. That case is not like the present. The claims have not been "inflated". They have, to coin a phrase, "been lumped up". They are genuine claims only that the plaintiffs' legal practitioner, Mr. Dokali, thought, erroneously, that a representative action was the way to proceed. There was, therefore, no abuse of the process of the court in this matter.

My view is that the statement should not be struck off. Those aspects of the statement of claim which relate to the representative action should be struck out and the statement of claim be amended accordingly. It may be that the other parties have to be joined as parties. It could be that the plaintiffs would want to commence the proceedings in the court below. I think they is free to do that. The application, therefore, succeeds to the extent mentioned. Costs to the defendant.

Made in Chambers this 30th day of December, 1993.

D F Nyamugulu
REGISTRAR OF THE HIGH COURT