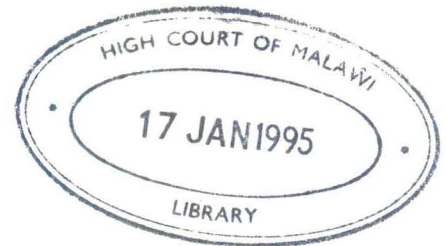


IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 690 OF 1987



BETWEEN:

NATIONAL BANK OF MALAWI PLAINTIFF

AND

R K J ZGAMBO DEFENDANT

AND

AGRICULTURAL MANAGEMENT SERVICES LTD THIRD PARTY

CORUM: MSOSA, J
Jussab, of Counsel, for the Plaintiff
Mhango, of Counsel. for the Defendant
Phiri, Senior Court Reporter
Tsoka (Mrs), Court Clerk



JUDGMENT

When trial of this case was about to commence, Mr Jussab informed the court that the plaintiff is satisfied with what has been recovered from the defendant after realising the security which the defendant had furnished to the plaintiff, for the repayment of the claim in these proceedings. The plaintiff, therefore does not wish to proceed with the action. The effect of that statement was that the plaintiff was discontinuing the action.

Mr Jussab addressed the court on the question of costs. He submitted that although normally a party that withdraws an action is condemned in costs the award of such costs are in the discretion of the court. He contended that since, in the present case the debt was recovered after the commencement of the proceedings and that the security was recovered with the knowledge of the defendant, the court should either make no order as to costs for the discontinuance or the costs should be awarded to the plaintiff.

Mr Mhango submitted that there are no special circumstances that would make this court to award the costs to the plaintiff who is withdrawing his claim. He said that the effect of discontinuance, as provided in order 21/2 - 5/9 is that costs on discontinuance without leave, the defendant is automatically entitled to get his costs. Therefore since the plaintiff has withdrawn his case, the plaintiff should pay the costs incurred by the defendant in defending the claim up to the time of the discontinuance. Mr Mhango further submitted that there is no evidence that the security was realised after the commencement of the action.

Mr Jussab, in reply informed the court that the security was realised in Civil Cause No. 729 of 1991 which commenced after the present action.

Mr Jussab, further submitted for the third party that the court should exercise its discretion in favour of the third party by setting aside the third party proceedings in terms of 0.16 r 6 since the defendant has failed to prosecute the third party proceedings. He said that the defendant took out summons for third party directions in April 1990 which he has not prosecuted up to date.

Mr Jussab, also submitted that the defendant's counterclaim should be struck out because it is res-judicata, the same being substantially the same as the one in the defendant's action against the third party in Civil Cause No. 455 of 1980 in which the court ruled that it was statute-barred. Mr Jussab asked this court to set aside or struck out the counterclaim, firstly because the defendant has failed to prosecute the third party proceedings and secondly because the counterclaim is res-judicata.

On third party proceedings, Mr Mhango in reply submitted that since third party proceedings are made in order to make the third party contribute or indemnify the defendant, then in the event of him being found liable, the third party proceedings fall away when the plaintiff withdraws his claims. He said that even if the court finds that the counterclaim still subsists, the proper way of dealing with the matter is by way of summons before a master as there are no exceptional circumstances in the present case.

It is clear from what Mr Jussab has said that the plaintiff has decided to withdraw his claim because the debt has been recovered to his satisfaction. The realisation of the security was made through Civil Cause No. 729 of 1991 which was for the realisation of security proceedings. It is therefore clear that the debt was recovered after the instant case had already commenced. In the circumstances, I find that the plaintiff was justified in entering a discontinuance.

The defendant took summons for third party directions which he has failed to prosecute up to date. When the case came up for hearing the defendant was not ready to proceed with the counterclaim. The attitude of the defendant clearly indicates that he has no intention to prosecute his claim.

Ordinarily an application to set aside third party proceedings should be by summons to the master. However the law allows the application to be made at trial in a proper case with exceptional circumstances.

In the instant case the defendant has not taken any steps which would indicate that he wishes to pursue his counterclaim. The defendant was aware that the case was ready for trial, several months before the date of hearing. This was even before the time that the Chief Justice adjourned the case to enable the plaintiff to reconcile their accounts in order to find out if

there is a balance to be paid by the defendant. The Chief Justice pointed out at that time that the third party proceedings were still on record. The defendant still has not taken any action. I would say that for all intents and purposes, the defendant has abandoned his claim. I therefore agree with the submission made by Mr Jussab that the way the defendant has handled the third party proceedings would qualify as exceptional circumstances upon which the third party proceedings may be set aside at trial. Consequently I set aside the third party proceedings with costs to the plaintiff.

I have further examined whether the issues raised in the counterclaim are similar to those that were raised in Civil Cause No. 455 of 1980 wherein the court ruled that the claims in that case were statute-barred. I find that the issues in both cases are related and that they arose at the same time and that if I had allowed the counterclaim to proceed, it was open to the plaintiff to raise the defence of res-judicata.

The general rule regarding costs is that the successful party will get the costs. However this is only a general rule and may have exceptions depending on the circumstances. The court has a discretion in awarding costs. All the circumstances of the case should be taken into consideration to ensure that reason and justice prevails.

I already pointed out that the plaintiff decided to withdraw his claim because he is satisfied with what he has recovered and does not find it necessary to proceed with his claim. I am of the view that the determining factor as to whether the plaintiff should pay the costs or not is the stage in the proceedings at which the debt was recovered. In the present case the pleadings closed in November 1989 and the debt was recovered in Civil Cause No. 729 of 1991 which commenced after the close of the pleadings in the present case. In the circumstances I award the costs to the plaintiff.

Made in Chambers this 11th day of July 1994, at Blantyre.


MRS A S E MSOSA
JUDGE

