



The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 809 OF 2011

Between

ANITA NANCHINGACLAIMANT

-and-

REUNION INSURANCE COMPANY LIMITED..... DEFENDANT

CORAM: A.J. Banda, Assistant Registrar

Mr. C. Kalua, for the Claimant

Mr. M M'meta, for the Defendant

Ms. Madalitso Galafa, Clerk/ Official Interpreter

Banda

RULING

Background

The claimant was involved in a road accident on 27th March, 2011. She commenced an action claiming damages for personal injuries against the defendant as an insurer of motor vehicle that was driven negligently, the negligence which caused the accident. The defendant denied liability and made an application to the Assistant Registrar for disposal of the case on point of law. The

application was dismissed and the defendant appealed to a judge. The judge in her ruling of 1st August, 2013, faulted the Assistant Registrar's decision and directed that the Assistant Registrar should reassign the case to another Registrar for rehearing. When the application was heard again, it was also dismissed. The matter went into trial after which, the claimant's action was dismissed by a judgment made on 24th August, 2014. The claimant appealed against the judge's decision to the Supreme Court which allowed the appeal and directed the registrar to assess damages. I heard the parties for the purposes of assessment pursuant to that direction by the Supreme Court of Appeal.

After the hearing of the assessment of damages and before I made an order, the defendant made an *inter partes* application to **dismiss or stay the claimant's case or to forfeit the claim for damages** on the ground of incapacity and fraud. The application was supported by a sworn statement made by the defendant's Claims Executive. The claimant's counsel swore a statement, which was filed and served accordingly. In addition, the claimant's counsel filed with the court and served the defendant a notice expressing his intention to object this court's jurisdiction. That is the background of this present ruling.

Issues

In this application, it is clear that I am called upon to deal with two legal issues as follows:

1. Whether a Registrar has jurisdiction to **dismiss or stay the claimant's case or to forfeit the claim for damages** on the ground of incapacity and fraud;
2. Whether to **dismiss or stay the claimant's case or to forfeit the claim for damages** on the ground of incapacity and fraud.

Analysis

Obviously, I have to deal with the issue of jurisdiction first. If I find that a Registrar does not have jurisdiction, I will dismiss the defendant's application. On the other hand, if I find that a Registrar does have jurisdiction, I will proceed to determine the defendant's application. The Constitution of the Republic of Malawi under section 9 provides that:

The judiciary shall have the responsibility of interpreting, protecting and judiciary enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.

Therefore, in resolving the issue of a Registrar's jurisdiction, I have to be mindful of legally relevant facts and the prescriptions of law. I set out the legally relevant facts above and I have to consider the prescriptions of law as per the constitutional requirement. The relevant statute with the prescriptions of law is the Courts Act and rules made there-under. Section 8 of the Courts Act, amended by **Act of Parliament number 7 of 2017** provides that the Registrar shall have jurisdiction, powers, and duties as the Chief Justice may, by Rules prescribe, from time to time.

Section 67(1) provides that the Chief Justice may make rules of court prescribing anything which, under this Act, may be or is to be prescribed and generally for the better carrying out of the purposes of this Act. The Chief Justice, in exercise of the powers under sections 8 and 67 of the Courts Act, made the Courts (High Court) (Civil Procedure) Rules, 2017 which became operational on 3rd day of October, 2017. Order 35 rule 6 CPR states that any new step taken in any matter after the appointment date must follow the dictates of the CPR. Powers and functions of the Registrar are provided under Order 25, which I have reproduced below:

1. Subject to the direction of a Judge, the Registrar may exercise the jurisdiction, powers and functions of the Court to make, or refuse to make, an order, on any or all of the following: -

- (a) Interlocutory orders, except orders for injunctions;*
- (b) Orders consented to by: -*
 - (i) The parties to the application for the order; and*
 - (ii) Any other person who will be required to comply with the order or to suffer anything to be done under the order;*
- (c) The amendment of documents;*
- (d) The extension or abridgment of time;*
- (e) The consolidation of proceedings;*
- (f) Service of documents;*
- (g) Entering judgment on acknowledgment of a claim of money;*
- (h) Entering a judgment in default;*
- (i) Setting aside a judgment in default;*
- (j) Striking out a proceeding;*
- (k) Issuing a summons to give evidence or produce documents;*
- (l) Inspection of a document or thing produced in response to summons;*
- (m) The enforcement of judgments or orders;*
- (n) Assessment of damages;*
- (o) Assessment of costs;*
- (p) Costs in respect of any order granted or refused by the Registrar; or*
- (q) An injunction where the parties consent to any order under a proceeding.*

2(1) The Registrar may, of his own initiative, or on application by a party, refer a proceeding before him to a Judge in chambers.

(2) Upon receipt of reference of a proceeding under sub rule (1), the Judge may:-

- (a) Hear and determine any issue which was before the Registrar in the proceeding; or*
- (b) Determine any question arising in the proceeding and may return the proceeding to the Registrar with directions as the Court considers appropriate.*

It is clear from a reading of Order 25 rule 1 CPR above that a Registrar has limited jurisdiction. There are specific types of matters that a Registrar may exercise jurisdiction on. An application such as that made by the defendant is not listed in Order 25 rule 1 CPR. Honourable Justice

Kenyatta Nyirenda in **Catherine Mwala v. Joyce Lipaya** , Civil Appeal No. 20 of 2015 had this to say:

"I am fortified in my view by the Latin maxim "*expressio unius est exclusion alterius*", that is, the expression of one thing is the exclusion of another. Under this maxim, the mention of one thing within a statute, contract, will and the like implies the exclusion of another thing not so mentioned. The maxim, though not a rule of law, is an aid to construction. According to Baron's Law Dictionary, 9th Edition, the maxim has application when:

"In the natural association of ideas, that which is expressed is so set over by way of contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment. Thus a statute granting certain rights to "police, fire, and sanitation employees" would be interpreted to exclude other public officers not enumerated in the statute. This is based on presumed legislative intent. As such, a court is free to draw a different conclusion where for some reason this intent cannot be reasonably inferred. "

In the matter under consideration, I am satisfied that the maxim applies to Order 25 rule 1 CPR above. Accordingly, I find that a Registrar does not have jurisdiction to determine the defendant's application to **dismiss or stay the claimant's case or to forfeit the claim for damages**.

However, Order 25 rule 2 CPR empowers the Registrar, of his own initiative, or on application by a party, to refer a proceeding before him to a Judge in chambers. However, it is my considered view that the nature of the application by the defendant does not fit the provisions of Order 25 rule 2 CPR to the extent that the High Court would have the power to dismiss or stay a final judgment of the Supreme Court of Appeal on the ground of fraud or incapacity. I cannot agree with counsel for the defendant that the application is only meant to dismiss the assessment of damages proceedings, as long as the effect would be to undo the direction of the Supreme Court that this court should assess damages.

The issue capacity as brought by the defendant cannot hold, if that line of argument is adopted because the applicant was already major when the Supreme Court of Appeal directed the Registrar to assess damages. The issue of capacity is a fundamental issue that should have been before the trial court. It was never brought before the Court. Further, I cannot forfeit any sums in damages. I believe this second limb of the application for the court to order a forfeiture of damages was made to cater for an event that the application was heard at a time damages were

already assessed. I had not made any order on assessment of damages at the time though. It is the Supreme Court of Appeal that made the order that the registrar must assess damages. Therefore, the defendant's application is basically concerning the Supreme Court of Appeal judgment which ordered an assessment of damages. Case authorities are available which clearly show that such applications must not be entertained. Mwaungulu, J (as he then was) in **Shiptrade International Company Ltd v Transglobe Produce Exports 7 [1997] 1 MLR 87** applied with approval the case of **de Lasala v de Lasala [1980] AC 546** in which Lord Diplock said:

Where a party to an action who seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside.

In a more persuasive recent decision, **Daniel Terry v BC Corporate Acceptances Ltd [2018] EWCA Civ 2422**, the claimants obtained judgment in default of defence for the full amount of the premiums paid and damages. The defendant applied to set aside the judgment, but this application was dismissed on the grounds of (i) excessive delay and (ii) failure to put forward a defence with a real prospect of success. He applied for permission to appeal this decision, but this application was also dismissed. Therefore, he appealed to the Court of Appeal. The Court of Appeal dismissed the appeal, agreeing with the judge that there was no jurisdiction to strike out the claim after final judgment, and finding that there were no grounds for setting aside. The court confirmed that where a party wishes to challenge a final judgment allegedly obtained by fraud, any such challenge should be made by one of the established methods, being: (i) appealing the decision and seeking to rely on fresh evidence and obtain a retrial, or (ii) bringing a fresh action to set aside the judgment.

In the present application, the defendant wants to dismiss or stay judgment under which the Registrar was directed to assess damages. Therefore, I am reluctant to refer the issue to a judge in chamber because doing so will interfere with the Supreme Court of Appeal's final judgment which, in the interests of finality, should remain in place. For reasons I have stated above, I dismiss the defendant's application with costs to the claimant.

Made on this 29th day of November, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR