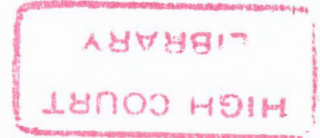




JUDICIARY



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 496 OF 2017

BETWEEN

BARNET CHAPOLA CLAIMANT

AND

THE ESTATE OF STEVE CHANJE (DECEASED) 1ST DEFENDANT

MICHAEL KAPITO 2nd DEFENDANT

PRIME INSURANCE COMPANY LIMITED 3RD DEFENDANT

CORAM : HER HONOUR MRS E. BODOLE

Kusiwa, of Counsel for the Claimant

Mlambe, of Counsel for the Defendant

Ms. Kazembe, Court Clerk

RULING

Introduction

This is an application by the claimant for summary judgment under Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules hereinafter called the Rules.

The Evidence

The claimant commenced the proceedings against the defendants claiming damages for personal injuries. The defendants filed their defence. The claimant brought an application for summary judgment. The defendants have raised a preliminary objection to the application.

Counsel for the defendants contended that the summons for summary judgment have been wrongly filed. The Registrar of the High Court does not have the power to enter summary judgment. He submitted that in accordance with Order 1 rule 4 of the Rules 'Court' means High Court of Malawi. The High Court is established by section 108 of the Constitution. The composition thereof as provided under section 109 of the Constitution is Judges of the High Court not less than three. Section 5 of the Courts Act is similarly worded. The office of the Registrar, Deputy Registrar and Assistant Registrar are established under section 7 of the Courts Act.

Order 12 of the Rules under which the application has been brought refers to the term 'Court' as the court to which the application shall be made. Order 25 of the Rules provides powers and functions of Registrars. The list under Order 25 of the Rules does not show summary judgment as an application to be handled by a Registrar.

Counsel for the defendants also raised a preliminary objection regarding the sworn statement sworn by Counsel of the claimant. He contended that the sworn statement is defective for not complying with the Rules as to its contents. So it cannot be used unless with the consent of the Court as provided under Order 18 rule 19 of the Rules. The sworn statement did not comply with Order 18 rule 7 (5) (c) and (d) of the Rules. Counsel for the defendants further contended that unless it is shown that the claimant obtained leave of the court, then the sworn statement cannot be used. If the court would order the matter to go to the Judge, the court should order that the summons be amended to show that the application should go to the Judge. The court should also order that the sworn statement should be made in proper format. He prayed for the application for summary judgment to be dismissed with costs to the defendant.

Counsel for the claimant contended that a summary judgment is an interlocutory application under Order 25 rule 1 of the Rules, as such this court has powers to hear the application for summary judgment. Even other powers that have been given to the Registrar under Order 25 of the Rules like default judgment and assessment of damages these Rules also refer to the 'Court.' This is just to show that the word 'Court' is used in areas where the Registrar also has powers.

As regards the sworn statement, Counsel for the claimant conceded that he had not complied with the provisions of Order 18 of the Rules. He stated that he had complied with Order 12 of the Rules as to the contents of the sworn statement.

In reply, Counsel for the defendants contended that a summary judgment, by its nature, is an order that leads to the final determination of the rights and liabilities of the parties to a case as if a full trial has been conducted. That is not the effect of an interlocutory order. It does not lead to the final determination of the rights and duties of the parties.

He further contended that where Registrars exercise powers of the 'Court', it does not mean that those powers have been taken away from the Judges. But specifically, Registrars powers are under Order 25 of the Rules. He submitted that Counsel for the claimant did not pray for leave that the sworn statement should be used, so the sworn statement cannot be used.

Applicable Law and Analysis

Order 1 rule 4 of the Rules provides that

"Unless the context otherwise requires-

"Court" means the High Court of Malawi."

Section 108 of the Constitution establishes the High Court of Malawi and section 109 of the Constitution provides the composition of thereof. It provides that the composition is such number of Judges of the High Court not being less than three.

Order 12 rule 23 (1) of the Rules provides that

“The claimant may apply to the Court for a summary judgment where the defendant has filed a defence but the claimant believes the defendant does not have any real prospect of defending the claim.”

Order 25 of the Rules gives powers to the Registrar to hear matters that are listed down in the Order including interlocutory orders. Summary judgment is not among the listed matters.

As per the above provisions, when reference is made to ‘Court’ in the Rules, it means a Judge of the High Court. It does not refer to a Registrar of that Court. Section 7 of the Courts Act establishes the office of the Registrar, Deputy Registrar and Assistant Registrar. Their powers and jurisdiction as regards the Rules are provided for under Order 25 of the Rules. The list under the Rules is exhaustive and not inclusive. That list does not show summary judgment application as one of the applications to be handled by a Registrar. So that application has been excluded from the list. Order 12 rule 23 (1) of the Rules clearly provides that summary judgment application should be made to the Court. This means that the application should be made to a Judge of the High Court and not the Registrar.

It is trite law that interlocutory applications are not final in nature. It does not end the proceedings before the trial court. A summary judgment is a final judgment as it resolves all issues pertaining to the parties. So when Order 25 of the Rules gives powers to the Registrar to make interlocutory orders, that does not include an application for summary judgment because such an application is final and not interlocutory in nature.

I, therefore, find that the summons for summary judgment was wrongly taken out. The application for summary judgment before this court is misplaced as that should have been brought before a Judge of the High Court.

Order 12 rule 24 of the Rules provides that

“An application for summary judgment shall be supported with a sworn statement which shall-

(a) verify the facts stated in the application;

- (b) state that the applicant believes there is no defence to the claim or part of it; and*
- (c) state the specific orders that are sought by the claimant."*

Order 18 rule 7 (5) of the Rules provides that

"A sworn statement shall contain an authorizing part at the end of the body of the statement that ...

- (c) states the person making the sworn statement understands the sworn statement shall be used in a proceeding;*
- (d) states the person who made the statement acknowledges that if he made a false statement he may commit perjury and be liable to a substantial penalty."*

Order 18 rule 19 of the Rules provides that

"A sworn statement shall not be used in a proceeding without the leave of the court if it has not been filed or has been filed in a defective form."

The sworn statement sworn by Counsel for the claimant complies with Order 12 rule 24 of the rules but does not comply with Order 18 Rule 7 (5) (c) and (d) of the Rules. It does not contain a statement that the person making the sworn statement understands the sworn statement shall be used in a proceeding. It also does not contain an acknowledgment by the person making the statement that if he made a false statement he may commit perjury and be liable to a substantial penalty. It is clear that the sworn statement is defective in form. It cannot be used in the application for summary judgment without the leave of the court. Counsel for the claimant conceded of the same but he did not seek leave of the court for the sworn statement to be used.

In the circumstances, I find that the summons are defective and since no leave of the court has been sought, it cannot be used in the application for summary judgment.

Conclusion

The application for summary judgment is dismissed with costs to the defendant.

Made in court this 28th day of February, 2018 at Blantyre.



E. BODOLE (MRS)

ASSISTANT REGISTRAR