



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2630 OF 2006**

BETWEEN:

ETHEL KUMBUKANI PLAINTIFF

AND

OFFICE MACHINES AND SUPPLIES LIMITED DEFENDANT

CORAM: Hon. Justice M.L. Kamwambe
Mr Chiphwanya of Counsel for the Applicant
Mr Tandwe of Counsel for the Respondent
Mrs Nkhoma, Official Interpreter

RULING

Kamwambe, J

This application was commenced by writ for the recovery of K13,700,000.00 being value of the house which amount the Applicant lost by selling her house so as to defray the Defendant's liability to Commercial Bank of Malawi. The Applicant applied under Order 41A rule 1 of the Rules of Supreme Court so that the court determines the matter on a point of law. The Defendant is objecting to have the matter determined under Order 41A rule 1 Rules of Supreme Court. The brief facts of the case are that the Defendant took a loan of K4,500,000.00 from Stanbic Bank Limited (then known as Commercial Bank of Malawi Limited) herein to be referred to as the Bank and it was secured by a charge on the Plaintiff's land being Title No. Chigumula 1/94 in 2002. On 28th

September, 2003 the property was valued at K13,700,000.00. The Defendant having failed to repay the loan owing to the Bank caused the Bank to realise its security from the sale of the Plaintiff's land. As a result of this the Plaintiff now seeks summary disposal of the action against the Defendant for restitution of the sum of K13,700,000.00

The issue for determination is whether this matter is one that can properly be determined under Order 14 A which reads as follows:-

1. *The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:-*
 - a. *Such question is suitable for determination without a full trial of the action, and*
 - b. *Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*

It is clear that the Defendant has not consented to disposing of the matter on a point of law alone. I have heard both parties on the issue and I have read their affidavits. I have also taken note of practice note 14A/2/8 Rules of Supreme Court which states that for purposes of Order 41 rule 5 (2), proceedings under Order 14 A are not interlocutory proceedings, since by its nature, the application will decide the rights of the parties and will terminate the action or otherwise finally dispose of it (see paragraph 41/5/3), and therefore affidavits for use in proceedings under Order 14A may depose only to such facts as the deponent is able of his own knowledge to prove (order 41, rule 5 (1)). I have consequently appreciated the arguments as to admissibility of such affidavit evidence, especially of Mr Kamulaga who was then Defendant's Managing Director.

The gist of the matter is that proceedings under Order 14 A Rules of Supreme Court presupposes that there are no disputes as to facts, otherwise if there are any then a full trial must be conducted. In considering whether proceedings under Order 14 A are suitable the court ought to look at all the facts surrounding the case. Matters of breach of duty on the part of the Applicant have been raised. It has also been deponed that the Applicant kept part of the loaned money as part security over her property. How much she kept is not known. It is understood that the Plaintiff did not disclose to who she sold the house and at how much and why for that much. The question also arises as to why the Bank itself did not sell the property. The issue of valuation of the property after one year of the charge arises. Further there is the issue of stock deficiency and failure by the Plaintiff to account for stock. In my view these matters are not trivia so as to be ignored. They cannot just be swept under the carpet. Even after determination of the matter on the point of law, some of these issues would surface in one way or another, bringing the matter back to court. This is not the purpose of Order 14 A which is intended to conclusively bringing proceedings to finality.

In view of the above, I deem it necessary that we proceed with caution so that we eventually attain the justice of the case. For this reason I take it that this is such a case that would require a full trial to be heard and I order likewise.

Costs to be in the cause.

Made in Chambers this 8th day October 2008 of October 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE