



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 532 OF 2012

BETWEEN:

McDAPHRAIN CHITHUZENI BANGO

PLAINTIFF

AND

ATTORNEY GENERAL

1st DEFENDANT

MALAWI TELECOMMUNICATIONS LIMITED

2nd DEFENDANT

Coram: Justice M.A. Tembo,

Chipeta, Counsel for the Plaintiff

Mzanda, Counsel for the 2nd Defendant

Mr Chitatu, Official Court Interpreter

ORDER

This is this court's order on the 2nd defendant's application for an order of stay of these proceedings pending trial of the plaintiff on perjury charges before the Blantyre Magistrate Court. In the present proceedings the plaintiff claims damages for false imprisonment and malicious prosecution. The perjury charges emanate from the testimony that the plaintiff gave in the present proceedings especially in relation to the manner of his arrest by the police, who are represented by the 1st

defendant, and also the role of the 2nd defendant in the process of the arrest of the plaintiff for possession of copper cables believed to belong to the 2nd defendant.

The 2nd defendant's application is made under Order 29 r 1 Rules of the Supreme Court or under the inherent jurisdiction of this Court. The plaintiff opposes the instant application firstly indicating that Order 29 Rules of the Supreme Court deals with injunctions which is not the case on the instant application. This Court agrees with the plaintiff's contention. It is surprising that the 2nd defendant made the instant application under Order 29 r 1 Rules of Supreme Court when that particular order provided specifically for applications for injunction.

The plaintiff further objects that this Court has no inherent jurisdiction to entertain the instant application for stay of these civil proceedings pending trial of the perjury charges in the lower court. The defendant referred to the case of *Chongwe v Nkhonjera* [1991] 14 MLR 56 in which the Court said that a court has inherent jurisdiction on matters it is known to have and on those aspects affecting its identity and powers. Where what the court is requested to do can only be conferred by legislation a court cannot invoke its inherent jurisdiction where Parliament should legislate. The plaintiff submitted that this Court is neither known to have the powers of stay the 2nd defendant has requested it to exercise nor do the matters at hand relate to aspects affecting this Court's identity and powers. The 2nd defendant however submits to the contrary.

This Court has considered the decision of the High Court in the case of *Chiumia v Southern Bottlers Limited* [1990] 13 MLR 114 (HC) where the Court stayed its civil proceedings pending conclusion of criminal proceedings emanating from the same facts as those in the civil proceedings in order to avoid an anomalous situation where the findings of the High Court and those of the lower court would be different on the concurrent issue before the two courts. It appears to this Court that such an order is made under the inherent jurisdiction of the High Court otherwise it would not be open to the High Court to make such orders of stay. This Court has therefore considered the submission of the plaintiff on the matter of this Court's inherent jurisdiction and concludes that this Court has inherent power to regulate its own procedure, which should include power to stay proceedings in appropriate cases, even if the rules of procedure do not provide for the same. See

Gala Estate Limited v Cheeseborough Ponds (Mal) Ltd [1991] 14 MLR 81. This Court therefore has power to hear the 2nd defendant's application.

The question at hand is whether this Court should order a stay of these civil proceedings pending the trial of the plaintiff, as an accused person, before the Blantyre Magistrate Court on allegations of perjury committed in the course of his testimony in the civil proceedings before this Court.

As rightly submitted by the plaintiff, and contrary to the 2nd defendant's submission, the scenario presented on this application is different from that in the case of *Chiumia v Southern Bottlers Limited* [1990] 13 MLR 114 (HC). In the *Chiumia* case there were civil proceedings for damages and criminal proceedings on theft charges before the High Court and Magistrate Court respectively and both proceedings emanated from the same facts namely the arrest of the plaintiff. In the present case we have civil proceedings in progress before this Court on a claim for false imprisonment and criminal proceedings on perjury charges pending in the Magistrate Court pertaining to the plaintiff's testimony before this Court. The question is whether this Court should stay the civil proceedings pending the trial on the perjury charges.

The plaintiff is alleged to have committed perjury, having lied under oath in these proceedings, to ensure that his facts implicate the 2nd defendant in his false imprisonment claim. The 2nd defendant's view is that it would be best if this Court stayed the present civil proceedings so that the trial in the Magistrate Court is concluded on the alleged perjury by the plaintiff. The 2nd defendant contends that concurrency of the civil and criminal proceedings shall result in prejudice to either the plaintiff or the 2nd defendant. The 2nd defendant referred to the case of *Jefferson v Betcha* [1979] 1 WLR 898 in which it was held that a stay of proceedings is granted when there is a real risk of serious prejudice which may lead to injustice in one or both proceedings where there are civil and criminal proceedings relating to the same facts and the same plaintiff.

On the contrary, the plaintiff contends that the allegations of perjury are frivolous and vexatious and that this Court ought not to entertain this application. The plaintiff gave reasons for his contention namely by explaining that he never lied in fact.

The view of this Court is that the argument of the plaintiff is actually an issue at the heart of the perjury trial before the Magistrate Court and also an issue material to the resolution of the plaintiff's civil claim before this Court. Consequently, this Court cannot start to evaluate and delve deep into the issue of whether the plaintiff in fact committed perjury or not.

This Court wishes to point out that where it is proved that the plaintiff lied under oath his claim may be dismissed. It is however rare that such lies under oath in civil matters lead to perjury charges.

In the present matter this Court has not yet determined whether the plaintiff lied under oath given that the 2nd defendant is still parading its witnesses. At the same time, the Magistrate Court has not yet started the trial on perjury charges. This Court is therefore persuaded in these circumstances to avoid prejudice to the plaintiff in the criminal matter by ordering a stay of the present civil proceedings as it pertains to the issue of the plaintiff's alleged perjury namely on the role of the 2nd defendant in the plaintiff's arrest. This view of this Court is supported by the persuasive case authority cited by the 2nd defendant of *Jefferson v Betcha* [1979] 1 WLR 898.

If this Court determines that the plaintiff indeed lied under oath in these civil proceedings whilst the criminal proceedings are in progress that would seriously prejudice the plaintiff as an accused person in the perjury trial before the criminal court. It is common knowledge that attendant criminal sanctions are severe.

On the other hand, if the criminal court finds the plaintiff guilty or not guilty and this Court later determines the plaintiff's current civil claim the civil sanctions on the plaintiff will not be as severe as those in the criminal trial had this Court decided this civil matter ahead of the conclusion of the criminal trial.

This Court notes that the reason a stay order was made in the case of *Chiumia v Southern Bottlers Limited* [1990] 13 MLR 114 (HC) was that if the High Court were to proceed with the civil matter, an anomalous situation would arise: the plaintiff may have succeeded before the High Court, only to be handed a guilty verdict in a lower court on a charge of embezzlement, the very conduct that led to his arrest by the servants of the defendants. The High Court was of the view that that was an untenable situation. This Court is of the view that what ought to be

emphasized more is the need to avoid prejudice to either party rather than the avoidance of an anomalous situation. In that regard, this Court is of the firm view that the principles enunciated on such matters of concurrency of issues in pending civil and criminal proceedings, that is *le criminal tient le civil en etat*, in the case of *Glazebrook v Housing* [2000] UR 180 are of significant persuasive importance, namely

- (1) where there are, or may be, concurrent civil and criminal proceedings, the Jersey Courts have a discretionary power to control the conduct of the civil proceedings so as to ensure that there is no real danger of prejudice to the fair trial of existing or potential criminal proceedings
- (2) the burden of persuading the court to exercise this power is on the person seeking such exercise
- (3) if the same or similar questions of fact will have to be decided in both sets of proceedings, it will generally be wrong to allow a decision to be made in the civil action before it is made in the criminal proceedings, because that would create a real danger of prejudice to the fair trial of the criminal proceedings
- (4) but it may be appropriate even in such a case to allow the interlocutory stages of the civil action to proceed so that there is not undue delay
- (5) if and in so far as the civil action can be decided without impinging on the question of fact to be decided in the criminal proceedings, then the civil action can be allowed to go to trial.

In the foregoing premises, it appears proper to order a stay of the present civil proceedings pending conclusion of the criminal proceedings on the perjury charges before the Blantyre Magistrate Court. This Court is also mindful that the perjury charges are not complex and the criminal matter should be determined quickly without occasioning inordinate delay in completion of the present civil proceedings that are at defence stage.

The plaintiff shall take out a notice of hearing of the present proceedings within seven days of conclusion of the trial before the Blantyre Magistrate Court on the perjury charges.

Made in open court at Blantyre this 16th June 2014.

M.A. Tembo
JUDGE