JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 57 OF 2016

BETWEEN:

GEORGE YIANNAKIS t/a GPY INVESTMENTS.....PLAINTIFF

AND

INDEBANK LIMITED..... DEFENDANT

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr Mbeta, Counsel for the Plaintiff

Mr. Chisanga SC Assisted by Mr. Kalua, Counsel for the Defendant

Mr. Kanchiputu, Court Clerk

RULING

On February 12, 2016, by way of an originating summons, the plaintiff commenced this action against the defendant seeking various declarations, orders and reliefs. Simultaneous to the commencement of the action, the plaintiff obtained an *ex parte* order of injunction restraining the defendant from seizing and disposing of the plaintiff's motor vehicles being 11 horses and 8 trailers used as security on loans with the defendant under Bill of Sale registered as Bill of Sale

Number 558 of 2012 or any other Bills of Sale or in any way interfering with the plaintiff's peaceful use of the said motor vehicles.

The court in granting the *ex parte*injunction directed the plaintiff to take out an *inter partes*summons on the injunction which the he duly did and was set for hearing on February 25, 2016, alongside the substantive originating summons. On February 24, 2016, the defendant filed and served notice of preliminary objection to the hearing of the originating summons and/or the *inter partes* summons for injunction on the grounds that the plaintiff's action is frivolous, vexatious and an abuse of court process and therefore ought to be dismissed. Come February 25, the scheduled hearing had to be adjourned to March 7, 2016, on account inadequate notice to the plaintiff of the defendant's preliminary objection.

When the court reconvened on March 7, it was proposed by the court and accepted by the partiesthat the hearing should proceed only on the preliminary objection considering that in the event that the objection is upheld then the plaintiff's action would fall off in its entirety.

This is now the court's determination on the defendant's preliminary objection.

Essentially, the defendant contends that the present action is frivolous, vexatious and an abuse of the process of the court in that the reliefs sought in the present case are similar, if not the same, as those the plaintiff sought in Civil Cause No. 155 of 2014, between the same parties. According to counsel, in that matter the plaintiff obtained an injunctionrestraining the defendant from seizing and selling the plaintiff's vehicles in exercise of powers given to it under a Bill of Sale. The defendant challenged the injunction and obtained an order vacating the same whereupon the plaintiff applied for stay of the order vacating the injunction and

Justice Kenyatta Nyirenda in his order dated February 1, 2016, exhibited as **CT1** to the affidavit of Meyer Gravel Chisanga, of counsel, in opposition to the *inter partes* application for injunction, dismissed the plaintiff's application for stay of the vacation of the injunction. Such being the case, it meant the defendant was at liberty to proceed with the seizure and sale of the vehicles but in order to frustrate the defendant, the plaintiff commenced the present action on the same Bill of Sale but before a different judge and obtained an *ex parte*injunction restraining the defendant from exercising its powers of sale under the Bill of Sale. It is the submission of the defendant that the earlier action having not been concluded, the plaintiff is precluded from running two concurrent actions on same facts.

What does the plaintiff say in answer to the defendant's case?

There are two points taken up by the plaintiff in challenging the defendant's arguments on the preliminary objection. Firstly, the plaintiff contends that the other earlier matter involving the same parties being Civil Cause no. 155 of 2014 was essentially concluded. According to counsel, such is the position as the court in its order of February 1, 2016, invoked its inherent jurisdiction to order the dismissal of the action. Secondly, it is the plaintiff's contention that the issues brought before the court in the earlier action and the present matter are substantially different. On this point, it is the assertion of counsel that in the earlier matter, there were two causes of action or issues namely that the defendant did not give the plaintiff the requisite statutory notice before exercising the power of seisure and saleand secondly that there was a repayment arrangement which the defendant disregarded in exercising the power of sale while in the present matter, the plaintiff is basically saying that what is owing to the defendant under the loan agreement was duly paid and the causes of action or issues are firstly that the defendant is charging penalty

principal which was not agreed upon or indicated in the loan agreement in contravention of sections 26 and 28 of the Consumer Protection Act and secondly or in the alternative, that if defendant is entitled to charging penalty principal that would have the effect of making the loan harsh and unconscionable under section 3 of the Loans Recovery Act. It is therefore the assertion of counsel that in the present case, the plaintiff is essentially challenging the amount claimed by the defendant as being due and payable which has nothing to do with the claims and what wasbeing pursued in the earlier action. Counsel thus argues that the situation that obtains is that out the same contract, that is, the loan agreement, there have arisen two sets of causes of actions which are independent of each other and the earlier action having been concluded, the present action cannot be an abuse of court process or re-litigation.

The power of the court todismiss an action for being an abuse of the process of the court is beyond question. The power is derived from practice note 18/19/18 and also under its inherent jurisdiction. It is said that the term abuse of the process of the court connotes that the process of the court must be used *bona fide* and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. There is a litany of cases on the subject among them **Castro v. Murray** (1875) 10 Ex. 213 and**Dawkins v. Prince Edward of Saxe Weimar.**

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material. Some of the examples of conduct constituting abuse of court process

cited by the commentators of the Rules of the Supreme Court in the practice notes under Order 18are re-litigation, collateral purpose, spurious claimand hopeless proceedings. In**Kasungu Flue Cured Tobacco Authority v Zgambo**[1992] 15 MLR 174 the Supreme Court of Appeal held that it was an abuse of court process to seek relief in one court and, when the relief was granted, to refrain from acting on it but to seek a substantially similar relief from another court. And in the caseof **Lonrho v. Fayed** (No. 5) [1993] 1 W.L.R. 1489alluded to by counsel for the defendant, Stuart-Smith L.J. held that if an action is not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it may be struck out as an abuse of the process of the Court. Counsel for the defendant, in advancing his case, has also relied on the plea of *lis alibi pendens*which according to counsel is based on the proposition that the dispute between the parties is already being litigated upon and therefore it is inappropriate for it to be litigated in the court in which the plea is raised and the South African Case of **Ceaserstone Ltd v The World of Marble and Granite and others** [2013]7 ASCA has been relied in that respect. The court in that case stated that the plea bears affinity to the doctrine of *res judicata* except that in *res judicata* there is already a judgement of the court. Counsel has also referred to another South African case of **Eravin Construction v Twin Oaks**Mafikeng High Court Case No.1573 of 2010 in support of the proposition that a plea*lis alibi pendens*will succeed on proof of pending litigation, between the same parties or their privies, based on the same facts and in respect of the same subject matter.

Should the plaintiff's action be thrown out for abuse of court process for being a duplicate legal proceedings under the principle of *lis alibi pendens* as prayed for by counsel for the defendant in paragraph iv of his skeleton arguments under the heading ANALYSIS?

In essence, the crux of the defendant's caseis that the earlier case between the parties having not been concluded the present action amounts to abuse of court process.The position of the law seems to be that generally, it would amount to an abuse of the process of the court for a plaintiff or an applicant to maintain two causes of action on the same issues. The plaintiff in this case asserts that there are no two causes of action between the partiescases running concurrently as the earlier case was dismissed by the court as evidenced by the order of the court itself. The very obvious question therefore is whether or not there are two cases between the parties running concurrently. Since the plaintiff asserts and alleges that the earlier matter was dismissed by the court one simply has to look at the order of the court to answer the question. The order of the court relied on by the plaintiff is exhibited as ***CT4***to the affidavit counsel for the defendant in opposition to the plaintiff's *inter partes*application for injunction which affidavit counsel adopted for purposes of the present determination. In the last but one paragraph on page 5 of the order the court stated as follows:

Clearly, the approach of the Plaintiff constitutes contumacious conduct and abuse of court process of the highest order. ***In the premises, the court has no option but to exercise its inherent jurisdiction and have the substantive action herein dismissed.***[Emphasis supplied]

The court then went further and in the last paragraph said this:

All in all, it would be "utterly unjust", " unconscionable" and "inexpedient" to grant the relief sought by the Plaintiff. ***The Plaintiff's Summons is accordingly dismissed*** *with costs to the Defendant.*Emphasis supplied]

From what the court said as quoted above, it comes out clearly that the court made two orders of dismissal. The first order, as per the court's own clear words, was a dismissal of the substantive action. The second order was a dismissal of the summons that was before the court being the plaintiff's summons for stay of an

order vacating the *ex parte* injunction the plaintiff obtained against the defendant restraining the defendant from seising and disposing of the plaintiff's vehicles. As just noted, the court in the first order dismissed the substantive actionand that being the case it cannot be said that there are two actions running concurrently. The position would have been different if the court had dismissed only the plaintiff's summons for stay. The plea of*lis alibi pendens*the defendant seeks to rely onwould therefore not succeed.

The court has also taken time to consider whether notwithstanding that the earlier action was concluded upon its dismissal, the present action would still amount to abuse of the court process on the basis that the reliefs sought in this matter are the same as in the earlier case. To begin with, it must be noted that in both matters the plaintiff obtained an injunction restraining the defendant from seising and disposing of the plaintiff's vehicle. The injunctions were by way of interim relief but a glance at the declarations and orders sought reveals that thesubstantive reliefs sought are different. They are different as the claims and/or causes of action are different as ably demonstrated by counsel for the plaintiff that in the earlier matter, the issues were about the alleged failure by thedefendant to give the plaintiff the requisite notice before seizing the vehicles and whether the defendant could exercise the right of sale despite having full knowledge of the circumstances leading to the lapse in servicing the loan advanced to the plaintiff while it the present case, the issue is about the propriety or legality of the defendant charging penalty principal when the same was not provided for in the loan agreement and whether charging penalty principal does not make the loan harsh and unconscionable under section 3 of the Loans Recovery Act. Therefore, much as the plaintiff in both matters obtained an injunction, it was merely by way of interim and not substantive relief as such it cannot be said that the reliefs sought in the two

matters are the same as to render the present matter an abuse of the process of the court.

There is also another aspect which has to be considered if it would render these proceedings an abuse of court process and that is the failure by the plaintiff to include in the earlier matter the issues raised in this matter.As the record of the proceeding would show from the end of page 40 to the first half of page 41, during the hearing the court actually quizzed counsel for the plaintiff why the issues raised in this matter were not raised in the earlier proceedings. The case of **Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd** [1975] A.C. 581 stands for the proposition that it is an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. In answer to query by the court, counsel invited the court to take note that the earlier matter was commenced in 2014 at which time the issue of penalty principal had not arisen as it only arose towards the end of 2015 when the plaintiff was repaying the loan with the belief that what he owed was K188,000,000.00 until later in 2015 when the defendant wrote advising that there were outstanding sums arising from penalty principal and subsequently sent him a statement which showed charges of penalty principal. It is, therefore, the contention of counsel that the cause of action arose well after the earlier one hence not included in the earlier matter. On his part, counsel for the defendant contends that the facts show that the plaintiff came to know of the penalty principal issue in June, 2015, as per exhibit ***GDY 3***in his own affidavit in support of the application for the *ex parte* injunction herein and that at that time the earlier action was still subsisting. ***GDY3***is described as a loan schedules. Counsel has also drawn the court's attention to exhibit ***GDY4***in the same affidavit being a letter from the defendant to the plaintiff dated July 24, 2015, again to show that the plaintiff knew

of the penalty principal issue during the subsistence of the earlier action. In essence, it is the contention of counsel that as the plaintiff was aware of the penalty principal issue in June and July, 2015, well before the earlier action was concluded by way of dismissal on February 1, 2016, it is an abuse of court process to commence this action on that issue in a new action.

There is no dispute that at the commencement of the earlier action in 2014, the issue of penalty principal had not arisen. Therefore the plaintiff cannot be faulted for not including it. But as it appears also not in dispute that the issue of penalty principal arose around June and July, 2015, during the subsistence of the earlier action, one would argue that the plaintiff ought to have included it in the subsisting matter by way of amendment and having not done so, the present action is an abuse of court process on the authority of**Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd**alluded to earlier.However, such may not be an attainable argument and correct position in this matter. According to the case of**Jelson(Estates) Ltd v. Harvey** [1983] 1 W.L.R. 1401 the proposition that it is an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings does not apply where there has been a mere procedural defect and the court has never gone into the merits, though both parties were before it.[Emphasis supplied]. As it is evident from the order of the court in the earlier proceedings, the dismissal of the earlier action was not on the merits. Therefore, on the authority of **Jelson(Estates) Ltd v. Harvey**alluded to the present action cannot be an abuse of the process of the court. The defendant's preliminary objection therefore has failed.

On costs, although the general rule is that the follow the event I would order that each party bears its own costs as it is the considered view of the court that although the defendant's preliminary objection has failed, it was worth pursuing

consideringthe facts the matter in totality.The matter is adjourned to Wednesday, November 2, 2016, at 10.00 am for the hearing of the plaintiff's *inter partes* application for injunction and originating summons. The parties to take note that at the hearing each side shall be allocated a maximum of 30 minutes to present its case.

Made this day of October 7, 2016, at Blantyre in the Republic of Malawi.

H.S.B. POTANI

JUDGE