



The Judiciary

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CASE NUMBER 547 OF 2017**

**Between**

**GRESHAM SALIJENI.....CLAIMANT**

**-and-**

**EASTERN PRODUCE MALAWI LIMITED..... DEFENDANT**

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**CORAM: A.J. Banda, Assistant Registrar**

Mr. Kazembe, for the Claimant

Mr. Zambezi, on brief for Mr. Katuya, for the Defendant

Mrs. Mpasu, Clerk/ Official Interpreter

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BANDA, AR:

**RULING**

**1. Background**

This is an application by the defendant to remove the claimant as a party to the proceeding and to set aside the proceeding under Order 10 rule 1 and 2 as read with Order 6, rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017; and sections 4 and 7 of the Statute Law (Miscellaneous Provision Act). The application is supported by a sworn statement made by Andrew Katuya, of counsel. The application is opposed by the claimant. The claimant though did not file any sworn statement in opposition but made oral submissions through counsel.

**2. Facts**

From the uncontroverted sworn statement of Andrew Katuya, the facts of the matter are that the claimant commenced this proceeding on 12<sup>th</sup> September, 2017 by a specially endorsed writ of summons alleging that he is brother of Lingson Salijeni. The claimant did not have any letters of administration to administer the estate of his deceased brother (at the time of filing the summons, as well as during the time of hearing this application). The claimant had stated that he had brought the action on his own behalf but also on behalf of William Salijeni, another brother of the deceased and also the

following sisters of the deceased, Gladys John, Loveness Salijeni, Patricia Mbedza and Violet Sikwata.

The claimant claim is for damages for loss of dependency, loss of expectation of life, special damages and costs of the action. This followed the death of Lingson Salijeni, from which the claimant alleges was the negligence of the defendant.

### **3. Arguments**

The defendant in this present application argues that neither the claimant nor the persons named as beneficiaries on behalf of whom the application is brought are beneficiaries by whom or for whom an action may be brought or maintained in terms of the relevant law. It is argued that the claimant is neither an administrator nor an executor of the estate of the deceased Lingson Salijeni. The defendant states that the claimant does not fall into the class of people that can take an action on their own behalf or on behalf of the beneficiaries of the deceased's estate under section 4 of the Statute Law (Miscellaneous Provisions) Act. The named beneficiaries are also not persons who can sue in the absence of an action by either an executor or administrator under section 7 of the Statute Law (Miscellaneous Provisions) Act.

The defendant therefore prays that the claimant here-in be struck out as a party in the proceeding for lack of capacity to maintain the action as he is neither an administrator nor a beneficiary for whom or by whom an action can be brought and maintained; neither are the persons on behalf of whom the proceeding is being maintained beneficiaries for whom a proceeding may be maintained under the relevant law.

The claimant, appearing through counsel Mr Kazembe, does not dispute the fact that he is neither the executor nor the administrator with letters of administration to administer the estate of the deceased Lingson Salijeni. He only asks the court not to dwell on technicalities but to allow that substantive justice take precedence over technicalities in line with Order 2 rule 2 as well as Order 2 rule 3 (d) and (f).

The claimant asks the court to give him a chance to amend the writ and statement of claim in order to comply with sections 4 and 7 of Statute Law (Miscellaneous Provisions) Act within 10 days. He stated that there was already an application for letters of administration before the High Court in respect of the deceased estate of Lingson Salijeni in order to proceed with the matter. He further said that the widow and children of the deceased would be added as parties and beneficiaries in the amended process. He argued that setting aside the action would just waste resources of the court, and of the parties because the claim would remain anyway.

In his reply to the remarks made by the claimant, counsel acting for the defendant in this application, Mr. Zambezi implored the court to ask itself whether a lack of legal capacity was an error that was curable by merely amending a statement of case. He did not think that the answer was in the affirmative despite that time and resources would have been wasted, by so holding. He further stated that the claimant did not say who exactly applied for the grant of letters of administration. He further said that in any case

the letters of administration should have been there at the commencement of this proceeding such that even in the case that they were granted they could not apply retrospectively. He also argued that the claimant would not simply be substituted by another.

Mr. Zambezi asked the court to uphold the Statute Law (Miscellaneous Provisions) Act over the subsidiary legislation in Courts (High Court) (Civil Procedure) Rules, 2017 in not allowing the amendment that the claimant prays for, as doing the contrary would mean that the court was amending statutory law. He finished by maintaining his prayer for the dismissal of the action by the plaintiff with costs to the defendant.

#### **4. Issue**

The issue is whether the proceeding should be dismissed for the reason that the claimant is not the right party.

#### **5. Analysis of Law and Fact**

Statute Law (Miscellaneous Provisions) Act in sections 4 (1) and 7 does provide who can sue on behalf of deceased victims of the torts. The self-explanatory relevant parts of the sections read as follows:

*Section 4 (1): Every action brought by virtue of this part shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall, subject to section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action, the court may award such damages as it may think proportioned to the injury resulting from such death to the persons respectively for whom and for whose benefit such action is brought.....*

*Section 7: Where, in any case intended and provided for by this Part, there shall be no executor or administrator of the person deceased, or if no action is brought by such executor or administrator within six months after the death of such deceased person, an action may be brought by and in the name or names of all or any of the persons for whose benefit such action would have been brought, if it had been brought by and in the name of such executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of such executor or administrator.*

There is no dispute that the claimant is neither an executor nor an administrator of the deceased person for whose estate he purports to act in this proceeding. He does not have the requisite papers. There is no will that names him as an executor. There are no letters of administration. He only states that there is an application for letters of administration. He does not mention the party seeking a grant of those letters. In making his argument, the claimant did mention that there is a widow and children of the deceased. Under section 43 as read with section 17 of the Deceased Estate (Wills, Inheritance and

Protection) Act, a wife and children are ordinarily the persons to be given priority to a grant of letters of administration.

A brother of a deceased person comes in the rank of priority whenever there are no surviving and qualifying members of the immediate family, who are spouse and children of the deceased. There are even grandchildren favoured in between the members of the immediate family and a brother under section 18 of the Deceased Estate (Wills, Inheritance and Protection) Act. Before the High Court is an application that may or may not be granted in favour of the applicant, whoever the applicant is. Even if it were the claimant that applied for the letters, there is no guarantee that the claimant will be granted the letters of administration whilst there is a widow of the deceased Lingson Salijeni. This court cannot proceed on speculation. In any case, I agree with the defendant that the letters would not apply retrospectively even if they were granted.

The claimant and all intended beneficiaries named in the writ of summons are indeed not persons that can bring this kind of proceeding under the relevant Act. The proceeding is therefore an anomaly in law. Can this anomaly be cured by Order 2 rule 2 as well as Order 2 rule 3 (d) and (f) of the Courts (High Court) (Civil Procedure) Rules, 2017? I very much doubt. A careful reading of Order 2 of the Courts (High Court) (Civil Procedure) Rules, 2017, shows that the Order deals with effects and powers of the court in cases where there is non-compliance by a party with the rules or orders of the court. It does not make provision for effects and powers of the court where there is non-compliance with Acts of parliament such as the relevant Act in this application.

I agree with counsel acting for the defendant. This case goes to capacity of the claimant himself. This is so basic and fundamental that there is nothing to salvage when a purported party is not the right party. The claimant does not have standing in law to bring this proceeding as a claimant. The proceeding must therefore be dismissed.

6. **Conclusion**

For the reasons discussed above, I dismiss the proceeding with costs to the defendant. To remove doubt and to be fair and just to the rightful parties not involved in this proceeding this far, including the claimant here-in, should he, per chance in future, get the right standing, a fresh proceeding over the same claim may be recommenced before the court on similar facts.

Made this 24<sup>th</sup> day of May, 2018.



**Austin Jesse Banda**

**ASSISTANT REGISTRAR**