



**IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)
LILONGWE REGISTRY**

COMMERCIAL CAUSE NO.337 OF 2018
CONSOLIDATED WITH COMMERCIAL CAUSE 136 OF 2014 (Blantyre Registry)

BETWEEN:

LOGART PROPERTIES CLAIMANT

AND

MALAWI PHARMACIES (2005) LIMITEDDEFENDANT

Coram: Hon. Charlotte Wezi Mesikano Malonda

Mr Chilenga, Counsel for the Claimant

Mr Bhana, Counsel for the Defendant

Mr Eric Ndhrazi Court Clerk

**RULING ON PRELIMINARY OBJECTION RAISED DURING AN APPLICATION
FOR SUMMARY JUDGEMENT**

INTRODUCTION AND BRIEF FACTS

1. The Claimant, in this case, is Lorgat Properties and the Defendant is Malawi Pharmacies (2005) Limited, whom I shall refer to as Malawi Pharmacies (MPL).
2. Lorgat Properties and Malawi Pharmacies have been battling in court since around 2014 on an issue related to outstanding rentals for property known as SW 8/597/1

in the City of Blantyre. The dispute was commenced as Commercial Case number 136 of 2014 in the High Court Commercial Division, Blantyre registry.

3. I will give a background of the case commenced in Blantyre. The case was initially before my brother Judge, Kachale J, it was eventually transferred to Mtambo J. My reading of the case file is as follows: Lorgat properties claimed K38,445.000.00 for rentals owing on SW8/597/1 plus compound interest and other charges. Malawi Pharmacies defended the case by pleading they had invited Lorgat properties, who accepted, to participate in the business venture whose participation would be through a special purpose vehicle known as AID Investments. Both parties signed a Memorandum of understanding which established Malawi Pharmacies (2005) Limited. Several provisions of the said MOU provided for other operational changes such as relocation of office premises (to the property in question), payment of rentals by Malawi Pharmacies and appointment of Lorgat as Managing Director, among other changes. Other undertakings in the MOU included capital injection into AIDL (the special purpose vehicle) by Lorgat, refurbishment of the factory premises and discharge of various loans. I must add that the list of undertakings is comprehensive. It is MPL's further defence that Lorgat failed to meet the undertakings made in the MOU, and they filed a counter-claim for the fulfilment of the obligations and other damages.
4. Lorgat Properties filed a defence to the counterclaim and denies breach of the agreement.
5. Malawi Pharmacies further filed a third party Notice adding AID Investments Ltd as a Third Party for indemnification purposes.
6. On 3rd August 2015, Lorgat Properties filed a Withdrawal Notice with the Court and on 23rd September 2015 filed a Miscellaneous Cause number 22 of 2015 for a warrant of distress for rent against Malawi Pharmacies Limited.
7. On the 1st of October 2015 before the High Court, under Commercial Case number 136 of 2014, Malawi Pharmacies Limited obtained an injunction to stop the execution of the warrant of distress.
8. On 5th November 2020, Logart Properties filed for a warrant of Distress for rent at the High Court in Lilongwe this time. On 11th August 2021 Malawi Pharmacies again obtained an Injunction under the same commercial cause number 136 of 2014, to stop the execution of the warrant of distress. On 18th November 2021, the case file was transferred to Lilongwe and consolidated with the present case.
9. The matter commenced before this court on 1st November 2018 and it was before my sister Judge, Mtalimanja J. My reading of the case file is as follows: Lorgat

Properties is now claiming K65,692,252.95 being rentals for property known as SW/597/1 in the City of Blantyre, plus interest and damages. Malawi Pharmacies (205) Ltd filed a defence. Apart from raising an issue on the fact that the matter was already commenced and withdrawn under Commercial Cause Number 136 of 2014 in Blantyre, they also raised the issue that the Lorgat Properties was known to Malawi Pharmacies as Ismail Lorgat. The rest of their Defence is identical to that filed in the Blantyre case.

10. The matter progressed to the mediation stage and mediation proceedings started before Justice Mtalimanja on 31st January 2019. Deliberations started, but both parties requested an adjournment for 14 days for reasons disclosed during the mediation.
11. The matter was adjourned until 12th March 2019, and scheduled for reporting.
12. On 12th March 2019 the matter was further adjourned due to none availability of both counsel Msisha and Chilenga, counsel for the respective parties. The matter was again scheduled for 11th April 2019.
13. On 5th November 2020 Lorgat Properties obtained a warrant of distress for rentals and again Malawi Pharmacies on 1st December 2020, obtained an order to stay the execution of the warrant of distress before my brother Judge, Manda J. The Stay was granted pending an inter-parties hearing to set aside the warrant of distress.
14. During the determination of the inter-parties application to set aside the warrant of distress, this court concluded on 10th June 2021 that the warrant of distress was not before this court hence the application was before the wrong forum. The court directed the following:

"The application is dismissed with advice to follow the right procedure with the right forum. As for the substantive matter, if the parties have failed to settle, they should proceed to process the case to the next stages based on the Courts (High Court) (Civil Procedure) rules of 2017".

15. On 19th August 2021, Lorgat Properties applied to this court for Summary Judgement.
16. The court scheduled the hearing of the application for 2nd March 2022. However, Malawi Pharmacies have raised a preliminary objection to the application raising issue with the fact that the substantive matter is still at the mediation stage and hence the Summary Judgement application should not proceed.

ISSUES IN DISPUTE

17. The contention in this court is to determine according to the Civil Procedure rules, at which stage is the substantive matter at, and if so whether to proceed or strike out the Summary Judgement proceedings.
18. Lorgat Pharmacies argues that they are entitled to apply to the court for Summary Judgement because the period prescribed for mediation has lapsed, hence an automatic termination of mediation proceedings.
19. Malawi Pharmacies argues that mediation has not been formally terminated hence an application for Summary Judgement is premature.

LAW

20. The basic legal provisions in contention, in this case, is the interpretation of the Courts (High Court) (Civil Procedure) rules of 2017, which I will refer to as the Rules.
21. Order 13 rule 2 of the Rules provides that:

- 1.—(1) Subject to sub-rule (2), all proceedings shall first go through mediation in accordance with this Order.*
- (2) This Order shall not apply to proceedings—*
 - (a) in a matter where by law or practice, the trial is expedited;*
 - (b) in an application for summary judgment;*
 - (c) in an application for judgment on admission; or*
 - (d) where the Court, in its discretion, so orders.*

*The same **Order 13, Rule 9** provides the following:*

- (1) Whereupon the conclusion of mediation a settlement agreement is not reached, the claim shall be referred to another Judge who shall continue with the claim from the point where, and at which, the claim was referred for mediation.*
- (2) Where there is no settlement agreement, the Judge who presided over the mediation shall make an order outlining the issues where the parties are in agreement and the issues where the parties are in disagreement and the order shall be referred to the Judge who shall continue with the claim.*

Rule 10:

- (1) The period of a mediation session shall not exceed a period of 21 days from the date of the first meeting of the session.*
- (2) The Judge may extend the period of the mediation session for a further period not exceeding 14 days from the date of expiry of the period.*

Rule 11:

A mediation session shall end when—

- (a) the parties execute a settlement agreement;*
- (b) the Judge cancels a mediation session for non-compliance on the part of any party; or*
- (c) the Judge, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile.*

APPLICATION OF LAW TO THE FACTS

22. In my earlier ruling on 10th June 2021, I made the following observations:

“18. Before explaining my reasoning, allow me to digress. I observe that the Claimant has exhibited that he is either forum shopping or abusing the court processes possibly due to the delays that have been occasioned in concluding this matter. This is because he chooses to withdraw the case in Blantyre, and proceeds to obtain a warrant of distress in Blantyre. After the court grants an injunction on the same, he changes lawyers and files a similar case at the Lilongwe Commercial Court. Whilst undergoing some out of court mediation, the Claimant executes a warrant of Distress against the Defendant through the Lilongwe Civil registry. It, therefore, comes to me as no surprise that the Defendant is disoriented as to which forum to prosecute his Defence. As the maxim says ‘He who comes to equity, must come with clean hands’. I do hope that in the future conduct of this matter, the Claimant will take heed of this. Should the Claimant wish for Summary Judgement to be entered, a necessary application should be made and properly argued by both parties in line with the Civil procedure rules (emphasis is mine).”

23. Further to that in paragraph 24 I gave the following directions:

“24. The application is dismissed with advice to follow the right procedure with the right forum. As for the substantive matter, if the parties have failed to reach a settlement, they should proceed to process the case to the next stages based on the Courts (High Court) (Civil Procedure) rules of 2017 (emphasis is mine).”

24. I have gone through the consolidated file, and considered submissions from both counsels. Both parties admit that they have failed to reach a settlement agreement however they both did not address the court on the progress of their out of court discussions.

25. The court record reflects that the substantive matter is still at the mediation stage. I beg to differ with the argument and submission by Counsel for the Claimant that mediation proceedings are automatically terminated due to lapse of time. It is my view and finding that the Civil procedure rules prescribe for mediation proceedings to be formally terminated before this court and my reasoning is explained below.

26. Order 13 rule 9 prescribes the process of terminating mediation as follows:

*(2) Where there is no settlement agreement, **the Judge (emphasis is mine)** who presided over the mediation shall make an **order (emphasis is mine)** outlining the issues where the parties are in agreement and the issues where the parties are in disagreement and the order shall be referred to the Judge who shall continue with the claim.*

Furthermore, Rule 11, is even more prescriptive as to how the Judge shall terminate mediation providing as follows:

A mediation session shall end when—

(c) the Judge, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile.

27. My reading and understanding of **Order 13 rule 2** are that Mediation will not apply in matters where there is an application for summary Judgement. Logically, this means, the application for summary Judgement ought to have come before mediation and not after.

1.—(1) Subject to sub-rule (2), all proceedings shall first go through mediation in accordance with this Order.

(2) This Order shall not apply to proceedings—

(b) in an application for summary judgment;

28. It is this court's finding that the parties have exhausted all discussions out of court and there are no prospects of settling on this issue. What is required now is for Mediation to be terminated through a Termination Order by the Mediator, in this case, the Judge.

29. At this point I would like to remind the parties that the overriding objective of the Civil Procedure Rules is to deal with proceedings justly. **See Order 1 rule 5.** If at

all Mandatory Mediation which is prescribed by the rules were to be understood to self-terminate mediation due to lapse of time, such interpretation would result in absurdity as parties would simply mislead and frustrate mediation proceedings by seeking an adjournment of mediation proceedings to wait it out. Hence defeating the purpose of the rules on Mandatory mediation which aims to converge the parties and isolate early in the proceedings how the dispute can be settled in part or in full. This ensures expedient disposal and early settlement of cases. On the side of the Court, this ensures active case management which includes the use of alternative dispute resolution, among other processes. Similarly, another example can be the entering of a Default Judgement. Such default judgement which is entered due to failure to file a defence within 28 days after service, must be entered by the Court. One cannot interpret that due to lapse of time, then Default Judgement is automatic. *See Order 12 rule 6.*

DECISION

30. Based on the reasoning above, it is my ruling that the Preliminary Objection raised against the application of a Summary Judgement is upheld. The Application for Summary Judgement is struck out.

ORDER

31. It is the Order of this Court that Mediation is no longer viable and is hereby terminated.

32. It is the further order of this Court that the matter should proceed to full trial.

33. Because this court has had recourse to the Judge's notes and mediation documents and formalities for this case, this case shall be referred to another Judge who shall continue with the Claim in line with Order 13 rule 9 of the rules.

34. Costs shall be in the cause.

Made in Chambers this 8th day of March 2022



Charlotte Wezi Mesikano Malonda
JUDGE