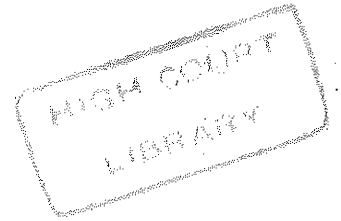


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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 176 OF 2020
Before the Honorable Justice Madise

BETWEEN

COLLINGS MANYAMULA AND 174 OTHERS.....CLAIMANT

AND

MOTA ENGIL.....DEFENDANT

CORAM: THE HONOURABLE JUSTICE D. MADISE
Mr. Kadyampakeni, of Counsel for the Claimant
Mr. Mbendera, of Counsel for the Defendants
Mr. Mathanda, Official Court Interpreter

RULING

1. This is an application by the Claimants for final judgment against the Defendant following claims emanating from the Defendant's negligence on the ground that the issue of negligence was settled through an order of summary judgment dated

7th June, 2015 and perfected on 29th June, 2015 in the matter of **Frank Harrison and 47 Others VS Motor Engel** Civil Cause No. 6 of 2014 (Zomba High Court) and that the Defendant does not have an arguable defence on the merits to the Claimants' claim.

2. **The Claimants Seek**

- (1) Damages for interference with the peaceful enjoyment of their property to be assessed
- (2) Damages for inconvenience
- (3) Damages for loss of crops
- (4) Damages for loss of property
- (5) Damages for loss of livestock

3. The application has been supported by a sworn statement of Carnisins Jamandani Kadyampakeni. In his sworn statement Counsel deposed that the Claimants were residents of Mtambalika, Masinda and Balaza Villages under Traditional Authority Chigaru in Blantyre. The Defendant was at the material time a Construction Company carrying on quarrying activities at Mgodhi Quarry, in Masinde Village in Blantyre and other surrounding villages.

4. That the claim for damages for personal injuries relate to activities conducted by the Defendant from 1st July, 2014 to the present date. That the dust has made the Claimants premises unhealthy and has adversely affected the Claimants and their properties. That as part of the quarrying activities the Defendant produced excessive noise and vibrations which affected the Claimants and their properties.

5. In the case of *Frank Harrison and 47 Others vs. Mota Engil* according to the endorsement on the amended writ; the claim was for damages representing the cost of renovation and rebuilding of each of the Claimants houses due to the damage and destruction from flying and spilling rocks as results of the negligence rock blasting activities by the Defendant. There was also a prayer for damages for inconvenience.
6. The Claimants in that case then made an application for summary judgment which was heard on 9th June, 2015. The same was supported by an affidavit. The Defendant also filed an affidavit in opposition. Since the Defendant did not contest the application an order of summary judgment was entered on the same day. A perfected order was issued on 29th June, 2015. (CTK 6).
7. The court assessed damages in favour of the Claimants then (CTK 8). That up to today the Defendant has not contested the summary judgment by way of appeal. That the order on liability was not set aside and remains in force and that the issue of negligence was already decided by the court. That damages and costs were assessed and paid by the Defendant.
8. That the Defendant's is estopped from denying liability on the claims brought in negligence in the present matter based on the said order of summary judgment in the case of *Frank Harrison*. That it will be an abuse of court process for the Defendant to contest these proceedings which are emanating from the issue of negligence which was decided by the court in 2015.

9. The Defendant filed a sworn statement in opposition deposed by Nthamenye Mbendera. He stated that it was not true that the Defendant had wrongly caused to arise from their business preaves any unpleased dust which spread to the Claimants and the Claimants did not adduce any evidence to support their claim. That the Defendant took reasonable measures to mitigate the impact of the project and that the Claimants did not adduce evidence to support the assertion that Quarry explosive activities caused damage to the Claimants. That the Defendants denied liability and filed a defence and a sworn statement in opposition to the application for summary judgment.

10. That it was not true that the application in the Frank Harrison case was not contested and counsel accepted liability without consulting the Defendant. That the money which was paid to Frank Harrison was without prejudice to the Defendant's rights. That the original summary judgment was altered by the Consent Order which was later drawn and signed by the parties.

11. The deponent stated that the Defendant used skilled operators to carry out the blasting operations who used a safe type of explosives. That water was being sprayed at the blasting site to minimize dust.

12. The Issues

There are three main issues for determination.

- (a) Whether the summary judgment in the Frank Harrison case is still valid in the within matter.

- (b) Whether liability in the Frank Harrison case extends to the present case.
- (c) Whether the summary judgment in the Frank Harrison case was altered by the subsequent consent order.

13. The Law

Order 12 rule 23 (1) Civil Procedure Rules, 2017

(1) The Claimant may apply to court for a summary judgment whether the Defendant has filed a defence, but the Claimant believes that the Defendant does not have any real prospect of defending the Claim.

(2) Order 26 CPR 2017. The court shall not enter summary judgment against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law.

14. In the Lovemore Dzumbira VS Malawi Broadcasting Corporation Civil Cause No. 171 of 2011 it was stated that *bringing the issue of contribution to the dismissal is taking the matter back to liability stage which is not my responsibility ...*

On appeal the Judge further said that the position at law is that once judgment is entered it settles issues **between the parties** (emphasis ours). Once judgment has been entered, the parties rights and obligations are settled. Issues so settled cannot be subject of litigation again. An attempt to reopen such issues is not only *res judicata* but also an abuse of the court process. See also DPP vs. Attorney General Constitutional Referral No. 3 of 2021. Alpine Industries vs Sacranie (1994) MLR 15. Similarly for only those cases where there is no reasonable doubt that the party is entitled to judgment and where therefore it is inexpedient to allow

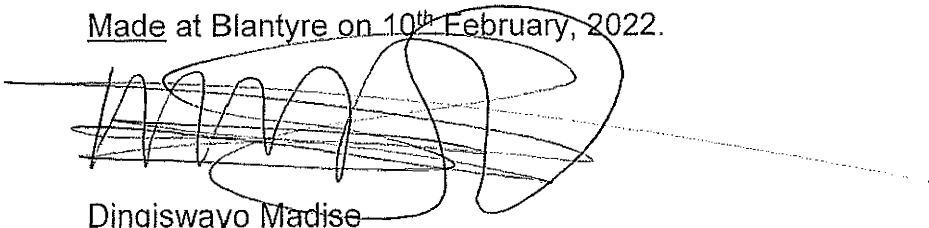
a defendant to defend for mere purposes of delay default judgment ought to be entered.

15. Looking at the facts before me it is clear that the summary judgment in the Frank Harrison case was not appealed against on the issue of liability. The judgment still stands. However the Consent Order which was signed in 2019 4 years later was a compromise to the damages which were awarded. The consent order does not affect the validity of that Summary Judgment.
16. Additionally Order 12 rule 23 Civil Procedure Rules 2017 as read with the Dzumbira case clearly states that a summary judgment once entered settles all the issues between the parties and the same cannot be litigated again. It is my finding that the summary judgment of 2015 settled the issues in the Frank Harrison case as between the parties. Those issues have nothing to do with the present case. These are new Claimants. To allow this application is to give the general public residing at the affected areas a blank cheque on liability against the Defendant.
17. The Defendant should be allowed to defend matters as they come and the Claimants must lead evidence to the satisfaction of the court on a balance of probabilities. To use the Frank Harrison case to continuously enter judgments against the Defendant will be unlawful, unreasonable and an abuse of process. Each case should be litigated on its merits. To use a Summary Judgment of 2015 in 2022 is an afterthought. Where were the Claimants all this time? The Frank Harrison case is *res judicata*.

18. I therefore find that the Frank Harrison case settled the issues in that case as between the parties. The consent order of 2019 did not alter the Summary Judgment. I wonder why the Claimants have been sitting on their rights since 2015 and 2019. In these premises the Claimants in this matter can use that case as evidence against the Defendant in the within matter if the action is not statute barred. The Claimants might wish to cite that case in aid of the present case if they so wish.

The application for Summary Judgment based on the Frank Harrison case was ill-conceived and is dismissed with costs.

Made at Blantyre on 10th February, 2022.



Dingiswayo Madise

Judge.