



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

MISCELLANEOUS APPLICATION NO. 112 OF 2016

BETWEEN

CHARLES KATHYOLA PLAINTIFF

-AND-

EASTERN PRODUCE MALAWI LTD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Suzi-Banda, of Counsel, for the Plaintiff

Mr. Mwangomba, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

On 1st December 2016, the Plaintiff filed with the Court an ex parte summons to transfer Civil Cause No. 109 of 2013 before the Senior Resident Magistrate Court sitting at Blantyre (lower court) to this Court and the order transferring the case was duly granted. This is an application by the Defendant to have that order set aside. The application is supported by an affidavit sworn by Mr. Happy Mwangomba [hereinafter referred to as the “Defendant’s Affidavit”].

The background to the application is of the simplest. By summons dated 13th May, 2013, the Plaintiff commenced an action before the lower court claiming general damages for personal injuries. Trial of the matter took place on 6th September, 2014, 5th February, 2015 and 13th February, 2015. The lower court delivered its judgment on 20th August, 2015 in favour of the Plaintiff. In its Ruling on

Assessment of Damages dated the same day, the lower court took the view that damages to be awarded would be beyond its jurisdiction. The relevant part of the Ruling on Assessment of Damages reads:

“...The Plaintiff made the following prayer with regard the award of damages:

- “i) K2,500,000.00 for pain, suffering and disfigurement;*
- ii) K2,000,000.00 for loss of amenities of life;*
- iii) K5,500.00 as special damages for fees for police and medical reports; and*
- iv) Any other such award as the court deems appropriate in the circumstances.*

...

As has been outlined above, the Plaintiff has made a prayer for damages to be awarded to the tune of a total sum of K4,505,500.00 being awards for pain, suffering and disfigurement; damages for loss of amenities of life and special damages for police and medical report. However, this far exceeds the court's jurisdiction which is limited to K2,000,000.00 as set out in section 39 of the Courts Act” – Emphasis by underlining supplied

The lower court, accordingly, ordered that the case be transferred to the High Court for assessment of damages. The Defendant contends that it was not aware of the judgment and the Ruling on Assessment of Damages until on 6th March, 2017.

It is the case of the Defendant that in applying for the transfer of the case the Plaintiff suppressed material facts as follows:

- “(i) The plaintiff did not disclose that the authorities on quantum that it sought to rely on to convince the court that the quantum in this matter should be beyond the jurisdiction limit of the magistrate court were available as at the date of commencement of this matter in the magistrate court and therefore, the plaintiff should have decided at that time to commence this matter in the High Court.*
- (ii) The plaintiff did not disclose to the court that in fact there was already an order made by the magistrate court ordering that the matter be transferred to the High Court. (see copy of order attached). ... We cannot have two orders from different courts on the same issue.”*

The Defendant also argues that the High Court does not have power under s. 26(1) of the Courts Act (Act) to do the things that the Plaintiff is asking the Court to do in this matter. Paragraphs 16 to 27 of the Defendant's Affidavit are relevant and these are couched in the following terms:

- “16. *The plaintiff who is legally represented by a lawyer knew the jurisdictional limit of the Magistrate court before commencing his matter in that court.*
17. *By commencing his matter in the Magistrate court the plaintiff obviously made an implied undertaking to be bound by the jurisdiction of that court.*
18. *The court has since already exercised its jurisdiction which is limited to MK2 million and there is no basis whatsoever to move the matter to the High Court.*
19. *If the plaintiff wants to move the matter to the High Court then the judgment of the lower court should be set aside because the judgment was made within the same limits of the jurisdiction of the Subordinate Court.*
20. *The jurisdiction of the Magistrate Court is one and the same and cannot be split between trial and assessing damages.*
21. *Having chosen to commence the action in the Magistrate Court the plaintiff cannot be heard to now turn around and allege that the matter is beyond the jurisdiction of the Magistrate Court.*
22. *The precedents he is referring to now on the possible quantum were available when the matter was being commenced in the magistrate court and he was free at that point to commence the matter in the High Court.*
23. *The alleged precedents cannot be a basis for the plaintiff to get an order for transferring this matter to the High Court as the reliance on them is speculative and the precedents are not binding on the courts.*
24. *I verily believe that what the plaintiff is doing is an abuse of the court process and that should be stopped by the court.*
25. *The defendant wants to appeal against the Ruling of the Magistrate Court.*
26. *A notice of appeal could not be filed within time because the defendant only got to know about the order on 6th March, 2016.*
27. **WHEREFORE**, *I humbly pray for the following order:*

- (i) *The order transferring the matter for the High Court be set aside.*
- (ii) *The matter be sent back to the Magistrate Court for continuation of court processes including assessment of damages.*
- (iii) *The court do make an order extending time within which the defendant may lodge an appeal against the judgment of the lower court.*
- (iv) *The plaintiff be condemned in costs of this application.”*

The application to set aside the order transferring the case is heavily contested by the Plaintiff and an Affidavit in Opposition, sworn by Mr. John Suzi-Banda [hereinafter referred to as the “Plaintiff’s Affidavit”], was filed to that effect. For purposes of parity of treatment, I will also set out in full the substantive part of the Plaintiff’s Affidavit. It reads:

- “3.6 *The Defendants knew about the judgement by the lower court at least by 6th March 2017 as alleged nevertheless did not take any reasonable steps to appeal against the said judgement.*
- 3.7 *Further to this, the Defendant became aware of the order transferring matter to o 17th February 2017 and again did not take any step at all to have the order set aside.*
- 3.8 *The Defendant only filed the summons to set aside order transferring matter to the High Court and leave to appeal out of time on 5th September 2017.*
- 3.9 *The Plaintiff lawfully obtained ex-parte order transferring the matter to the High Court.*
- 3.10 *I verily believe that the High Court has power under section 26(1) of the Courts Act to entertain the Plaintiff for assessment of damages as the High Court has unlimited jurisdiction.*
- 3.11 *I verily believe that the Plaintiff cannot be stopped to transfer matter from court with limited jurisdiction to a court with unlimited jurisdiction as long as justice is achieved.*
- 3.12 *The Defendant’s application if entertained would clearly cause injustice to the Plaintiff who is a successful litigant in this matter.*
- 3.13 *In any case, the Defendant has not indicated intention to appeal or set aside the decision of the magistrate transferring the matter to the High Court of 20th August, 2015.*

- 3.14 *The matter has already taken so long and the Defendant took too long to bring the present application despite being served with the order in issue.*
- 3.15 *The Defendant's application lacks merit if anything the Defendant would have promptly commenced this application soon after becoming aware of both judgement and the order transferring matter to the High Court."*

The Defendant filed an affidavit in reply wherein it explains that it did everything possible to have the application heard expeditiously:

- "3. *I filed an application to set aside the ex parte order in this matter on 14th March, 2017. I hereby exhibit my office copy of the summons and affidavit in support clearly showing this fact and mark D3.*
4. *However, the Registry kept assuring us that the documents were being processed and we kept waiting for a date only to discover when we inquired later that the documents had not been processed and the set we filed was missing.*
5. *Upon hearing this we produced another set and gave the Registry to process without delay.*
6. *So it is clear from the foregoing that the delay in hearing this application has not been occasioned by the defendant. The defendant did what it was supposed to do immediately it became aware of the ex-parte order."*

The submissions by Counsel Mwagomba were concise and the same are reproduced below:

- "3. *My Lord, the jurisdiction of the court of Senior Resident Magistrate Court is fixed under section 39 of the courts Act (Cap 3:02). Its jurisdiction is only up to MK2,000,000. This limit should be well known to legally represented litigants. We submit that in this case the plaintiff knew what he was doing and also knew that the jurisdiction limit of the Senior Resident Magistrate is MK2,000,000. With this knowledge he decided to commence this action in the Senior Resident Magistrate. He submitted himself to the jurisdiction of Senior Resident Magistrate*
4. *A litigant who chooses to commence action in the Senior Resident Magistrate Court submits himself to the jurisdiction of that court. In Engen Limited v Alive Joshua Miscellaneous Civil Appeal no. 15 of 2013 Honourable Justice Potani laid the law as follows:*

"Having said that, this court is of a strong inclination that in dealing with the question whether a subordinate court has jurisdiction over unliquidated claims, the distinction between the issues of liability, on the one hand, and issues of damages recoverable or awardable on proof

liability, on the other hand, must be appreciated. If that distinction is properly understood and appreciated there should be no jurisdictional limit on a subordinate court in assuming jurisdiction and determining the issues of liability on an unliquidated claim. Once a subordinate court deals with the issue of liability and finds for the plaintiff it would then have to be wary of the monetary jurisdiction limit provided for by the Courts Act. In essence, in awarding damages to the plaintiff the court would have to restrict itself to the statutory monetary jurisdiction limit. What this means is that a plaintiff who chooses to bring an action on an unliquidated claim to a subordinate court submits to the monetary jurisdictional limit of such a court in terms of the final quantum of damages he would get. By way of analogy a litigant who commences proceedings in the High Court instead of a subordinate court can only recover costs at subordinate court scale. See Attorney General v Joseph Magombo MSCA Civil Appeal No. 9 of 1985.

5. *My Lord, it must also be appreciated that the jurisdiction of the court is not dividable. It is a whole. The jurisdiction prescribed under section 39 of the Courts Act cannot be divided into liability and quantum. In fact quantum prominently comes out because the sum the court may award is fixed at MK2,000,000. The jurisdiction is not divisible. In Kalumpha v Kalumpha civil appeal no. 1 of 2010 Mwaungulu J (as he was then) said:*

“Jurisdiction may be concurrent: it is, however, indivisible. A court cannot have jurisdiction on one part and have the other part in the jurisdiction of another. A court can have jurisdiction or have no jurisdiction. Once it is established that a magistrate court has jurisdiction to dissolve a marriage, it has jurisdiction to make ancillary orders attending the primary jurisdiction. The suggestion that a magistrate court can dissolve a marriage leave ancillary orders to a higher court where the value of matrimonial property is higher than its monetary jurisdiction cannot be right because subordinate court has no power to transfer proceedings from itself to the High Court.”

The jurisdiction of the magistrate court in personal injuries cannot be split. You cannot say that the court has jurisdiction to determine liability and at the same time has no jurisdiction to assess damages. The subject matter is the same. In this case its one and same subject matter breach of duty and damage arising there from.

6. *Applying the case of Kalumpha v Kalumpha (supra) once the magistrate is found to have jurisdiction to determine a personal injury claim, it also has jurisdiction to make an order for assessment of damages up to its jurisdictional limit to which the plaintiff would be bound having decided to commence the matter in that court with full knowledge of its monetary limit.*

7. *The power of the High Court under section 26 of the Courts Act is supervisory or revisionary. The power is restricted to these two aspects. To supervise is simply to make sure that everything is correctly done (see Oxford Advanced Lecturers Dictionary (7th Edition). There is nothing that the subordinate court has improperly done to attract invocation of supervisory power of the High Court. The court has not acted inappropriately in any way.*
8. *My Lord, the same applies to revisionary power. There is nothing that has been improperly done to warrant a revision in this matter.*
9. *Therefore, we submit that there is nothing in this court to warrant the court exercise its power under section 26 of the courts Act. The plaintiff is clearly abusing the court process. Section 26 cannot apply in this matter. The plaintiff decided to commence the action before the Senior Resident Magistrate Court. The plaintiff did this with full knowledge of the jurisdictional limit of the Senior Resident Magistrate Court. The matter is properly before Senior Resident Magistrate Court. The High Court should allow the Senior Resident Magistrate Court do its job.” – Emphasis supplied by Counsel Mwagomba*

Counsel Suzi-Banda was also concise and brief in his submissions. He referred the Court to s.26(1) of the Act and s. 108 of the Constitution and contended as follows:

“... in the present case it is undisputed fact that the High Court has powers to order transfer of the matter from the lower court. In doing so, the only consideration is the interest of justice. Looking at the available evidence and indeed thee comparable case authorities, the damages that may be awarded to the Plaintiff would certainly be beyond the jurisdiction of the subordinate court. Therefore, in order to achieve justice and act fairly to the Plaintiff in the circumstances it is only prudent to have the assessment done in the High Court. We submit therefore that the court properly granted order transferring the matter herein from the lower court and the present application is not made in good faith.”

Counsel Suzi-Banda also argued that the Plaintiff made full and frank disclosure of all material facts in that *“The Plaintiff attached all the necessary documents and the Court was convinced with all the material before it. Cases relied upon were duly cited”*.

I have carefully considered the submissions by both Counsel. It is trite that a party who commences a case in a subordinate court for unliquidated damages submits to the monetary jurisdictional limit of the subordinate court: see **Engen Limited v. Alive Joshua**, supra. In the present case, the Plaintiff knew, or ought to have known, from the word go that his claim for award of damages exceeded the monetary jurisdictional limit of the lower court, that is, K2,000,000.00. This is

clear from a perusal of the Ruling on Assessment of Damages which states that the Plaintiff included prayer for, among other heads of damages, the sum of “K2,500,000.00 for pain, suffering and disfigurement”.

There is another ground why the ex-parte order transferring the case from the lower court to this Court has to be set aside. Disclosure of material facts is critical in any ex- parte application. In the apt observation by Scrutton LJ in **Republic v. Kensington Income Tax Commission Ex-parte Princess Edmond de Polignac [1917] KB 486**:

“It is perfectly well settled that a person who makes an ex-parte application to the court, that is to say, in the absence of the person who will be affected by that which court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has been wrongly obtained by him.”

The same point was made by Kay J in **Republic of Peru v. Dreyfus Brothers & Company (55 L.T. 802 at 803)** in the following terms:

“I have always maintained, and I think it is most important to maintain most strictly, the rule that, in ex-parte applications to this court the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated and shall never hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this court the importance of dealing in good faith with the court when ex-parte applications are made.”

It has to be borne in mind that material facts are facts which if known to the court would have led the court to arrive at a conclusion or order different from the one it arrived at. The term “*material facts*” encompasses points of law. Therefore, for the conclusion to be reached that the plaintiff suppressed or misrepresented facts, the alleged suppressed facts must be facts or points of law which if they were laid before the court the ex-parte injunction could not have been granted: **Gloria Mchungula Amani v. Stanbic Bank Limited and Another, HC/PR Civil Cause No. 558 of 2007(unreported)**.

I have carefully analysed the affidavit evidence before the Court and I am satisfied that the Plaintiff did not only suppress material facts at *ex parte* stage regarding the fact that the lower court had already made an order transferring the issue of

assessment of damages to the High Court but also continued to suppress the same in the Plaintiff's Affidavit. It was incumbent upon the Plaintiff to explain why, despite the existence of the lower court's order, he still went ahead to institute fresh proceedings in the High Court seeking the transfer of the same matter.

The fact of the matter is that the Plaintiff could not rely on the order by the lower court transferring the matter because the lower court lacked jurisdiction to effect such a transfer. Section 46 of the Act deals with transfer of proceedings and it reads:

- “(1) Subject to any written law, a subordinate court may—*
- (a) transfer any proceedings before itself to a subordinate court of a lesser grade;*
 - (b) transfer any proceedings before itself to any subordinate court of a higher grade with the consent of such court; and*
 - (c) direct the transfer to itself of any proceedings before any subordinate court of a lesser grade.*
- (2) A subordinate court shall comply with any direction given to it under subsection (1).”.*

It is evidently clear that s. 46 of the Act allows a subordinate court to transfer proceedings to another subordinate court. This section does not empower a subordinate court to transfer proceedings from itself to the High Court.

Section 40 of the Act makes provision regarding counterclaims in subordinate courts and it is in the following terms:

- “(1) Where, in any action or suit of a civil nature before a subordinate court, any defence or counterclaim of the defendant involves matters beyond the jurisdiction of such subordinate court, such defence or matter shall not affect the competence or the duty of the subordinate court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and any defence thereto, but no relief exceeding that which the subordinate court has jurisdiction to award shall be given to the defendant upon such counterclaim.*
- (2) In any such case the High Court may, if it thinks fit, on the application of any party order that the action or suit be transferred to the High Court and the action or suit*

shall then be proceeded with as if such action or suit had been originally instituted therein.”

It will be observed that s. 40 of the Act allows the High Court, and not the subordinate court itself, to transfer a case from a subordinate court where a counterclaim exceeds the jurisdiction of the subordinate court.

Section 26 of the Act vests the High Court with general supervisory and revisionary jurisdiction over all subordinate courts. In this regard, the High Court may if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

Section 41 of the Act provides that a plaintiff may relinquish any portion of his claim in order to bring the action or suit within the jurisdiction of a subordinate court, but he shall not afterwards sue in respect of the portion so relinquished. It is noteworthy that this section does not in any way empower the subordinate court to transfer such an action to the High Court.

What comes out of the analysis of the above-mentioned sections is that the framers of the Act went out of their way to spell out in clear and express terms that a subordinate court can only transfer proceedings to another subordinate court and it is the High Court that can transfer to itself a case from a subordinate court. Neither the Act nor the Subordinate Court Rules empower a magistrate court to “refer” or “defer” a matter to the High Court.

In this regard, the order by the lower court was ultra vires. A magistrate court, whose jurisdiction is essentially statutory, cannot under the Act refer or transfer a case to the High Court for want of jurisdiction: see **Gladys Ndunya v. Gift Ndunya, HC/PR Miscellaneous Matrimonial Cause No. 24 of 2015 (unreported)**.

As already observed hereinbefore, it is trite that an applicant who fails to make full disclosure of material facts cannot obtain any advantage from the proceedings and he or she will be deprived of any advantage he or she may have already obtained

by means of the order which has thus been wrongly obtained by him or her. Unless *uberrima fides* can be established, the Court ought not go into the merits of the case, but simply say “*We will not listen to your application because of what you have done*”: see also **Vitsitsi v. Vitsitsi [2002-2003] MLR 419 (SCA)** and **Koreia v. Designated School Board [1995] 2 MLR 649(HC)**.

In the present case, there is just no way in which the order sought to be set aside would have been granted were it that the Plaintiff had disclosed why it could not rely on the order of transfer by the lower court. Having already obtained an order from the lower court transferring the case, it was absolutely irregular for the Plaintiff to seek from the High Court another order on the same issue without disclosing why the order by the lower court could not be relied on.

All in all, the order transferring the matter from the lower court to this Court cannot be sustained. That order has, accordingly, to be set aside with costs. I so order.

On the basis of the foregoing considerations and in exercise of this Court’s general supervisory and revisionary jurisdiction over all subordinate courts, I order that the lower should conclude the determination of Civil Cause No. 109 of 2013 by making the necessary ancillary orders with respect to assessment of damages within 30 days hereof.

Pronounced in Court this 11th day of December 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE