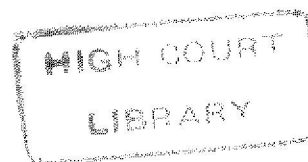


05



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 371 OF 2019**

BETWEEN

TIFFINESS TEMBO..... CLAIMANT

-And-

ELECTRICITY SUPPLY CORPORATION OF MALAWI (LTD)..... DEFENDANT

CORAM: Hounourable Justice A. Kanthambi

Mr. Mbulo Counsel for the Claimant

Mr. M. M'meta Counsel for the Defendant

Mrs. M. Chilemba Official interpreter

RULING

6th August, 2021

Introduction

1. The Claimant commenced an action in negligence against the Defendant. In turn, the Defendant filed its defence. The matter went for mediation. Subsequently, the Claimant filed an application for summary judgment.

2. In the application for summary judgment, the Claimant alleges that, on 29th January, 2020, the parties herein before the Principal Resident Magistrate Court entered into a consent order in favour of the Claimant. As per the said consent order, the Defendant was ordered to remove the LV OHL power line over the Claimant's grass-thatched kitchen within 60 days which the Defendant complied.

3. That, the Defendant was ordered to pay the sum of MK1,800,000.00 as damages for inconvenience inclusive of legal costs which the Defendant complied. In January, 2020, the Claimant moved to Blantyre and after observing that the Defendant was not paying compensation commenced the present proceedings for damages for pain and suffering, damages for loss of amenities of life;

4. The Defendant filed its defence in the present matter denying liability. As per paragraph 6 of the Defendant's defence it only states that kitchen was on the wayleave corridor thus it was not their fault but that of the Claimant.

5. The Claimant alleges that, in the Principal Resident Magistrate's Court, the Defendant conceded to be at fault and agreed to remove the LV OHL power line and went ahead to remove the line, which according to the Claimant, showed that the Defendant was at fault. Further the Defendant's agreeing to pay damages for inconvenience as a result of the LV OHL power line passing over the Claimant's kitchen shows admission that it was at fault.

6. The Claimant further argues that, the only issue that the Defendant is raising in its defence, that the power lines were erected before the Claimant built her kitchen, is just an after-thought as the same was not raised in the Magistrate Court where the Defendant not only conceded, but also, accepted to pay damages for inconvenience result of the LV OHL power line passing over the Claimant's kitchen.

7. The Claimant also argues that the Defendant's defence in the present matter is a sham and lacks merits having conceded already to be at fault for the positioning of the LV OHL power line and for causing inconvenience to the Claimant. Other issues being raised now by the Defendant were not raised in their defence. The Claimant further argues that the new issues being raised by the Defendant have the effect of amending the defence through the back door when no application has been made to amend the same.

The Defendant's Arguments

8.0 The Defendant argues that the Claimant's application should be dismissed with costs on the following grounds:

8.1 *That the Claimant's application does not state any facts or grounds that form the*

premise for the application. That the application is brought in a vacuum. A sworn statement as envisaged in O.12 r.24(a) of the Courts High Court (Civil Procedure) Rules 2017 (hereinafter referred to as CPR) can only verify the facts (or grounds) in the application. In other words, the application ought to lay out the grounds for the application. In this case, there are no such facts in the actual application. In other words, the application does not have facts that can be verified by the sworn statement.

8.2. *The Summons in the Magistrate Court, on which the Claimant relies upon in the Sworn Statement, had no allegations for negligence. In any event, the parties in the Magistrate's Court agreed on their own accord to compromise and settle the matter. There was no finding of liability in negligence nor admission thereof. We refer the Court to exhibits "LEM 3" and "LEM 4" in the sworn statement of Leonard Emmanuel Mbulo.*

8.3. *The law on negligence requires proof of causation and there was no such proof in the Summons before the Magistrate's Court. The Claimant cannot and should not be allowed to short circuit the legal burden of proof of causation.*

8.4. *There is a good and arguable defence on the following:*

- (a) *Whether the Claimant was electrocuted by ESCOM Wires as shown in the medical report (exhibit "LEM 1") or not.*
- (b) *Whether the Claimant was burnt by a roof which fell on her as per paragraph 6 of the statement of case.*
- (c) *The whereabouts of the Claimant at the time of the occurrence of the alleged incident, that is, whether she was inside or outside of the kitchen.*

- (d) *The Defendant alleges in its defence that the power lines were erected before the Claimant built her kitchen. **The defendant does not erect power lines above buildings.***
- (e) *In paragraph 6 of the defence, the Defendant disputes that the power lines were low lying as proper care is at all material times exercised on all electric polls and transmission cables. The Claimant has to prove the assertion that the lines were low lying.*

9. *The defendant then argues that the applicant has failed to demonstrate before the Court that the Defendant does not have any real prospect of defending the claim, and so the application must be dismissed with costs.*

The Issue

10. Whether the Court should enter a Summary Judgment.

The Law

11. According to O.12, r. 23(i) of the Courts (High Court) (Civil Procedure) Rules 2017;
"The Claimant may apply to the Court for a summary judgment where the Defendant has filed a defence but the Claimant believes that the Defendant does not have any real prospect of defending the claim."

12. Further, O.12, r. 24 of the Courts (High Court) (Civil Procedure) Rules 2017 states that:

"An application for summary judgment shall be supported with a Sworn Statement which shall:

- (a) Verify the facts stated in the application;*
- (b) State that the applicant believes there is no defence to the claim or part of it; and*
- (c) State the specific orders that are sought by the Claimant*

13. Order.12, r.25(b) of the aforesated Courts (High Court) (Civil Procedure) Rules 2017 further provides as follows;

"For purposes of rule 23- the Defendant may file a sworn statement setting out the reasons why the defendant has a good and arguable defence, and shall serve the statement on the Claimant at least 7 days before the date of hearing"

14. Finally, O. 12, r 26 of the Courts (High Court) (Civil Procedure) Rules 2017 states as follows:

"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."

Whether or Not to Enter a Summary Judgment

15. The Defendant raises issues with the present application, that the the Claimant's application does not state any facts or grounds that form the premise for the application this court finds that the assertion by the defence is true. While the claimant did not address this particular point raised by the Defendant, this Court observes that the Claimant's application is crafted in the following manner, and I quote only the relevant section:

**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL CAUSE NO. 371 OF 2019**

BETWEEN

TIFFINESS TEMBO..... CLAIMANT

-And-

ELECTRICITY SUPPLY CORPORATION OF MALAWI (LTD)..... DEFENDANT

INTERPARTES APPLICATION FOR SUMMARY JUDGMENT

**UNDER ORDER 12 RULW 23(1) OF THE Courts (HIGH COURT) CIVIL PROCEDURE
RULES, 2017**

LET ALL PARTIES attend the Judge of the High Court of Malawi, Principal Registry, Civil Division on the 17th day of February 2021 at o'clock in the noon for the hearing of an application on the part of the Claimant for summary judgment.

TAKE NOTICE that the sworn statement of **LEONARD EMMANUEL MBULO** filed herein shall be read in support of this application.

Dated theday of2020

REGISTRAR

16. As noted from the application above, as the Defendant rightly argues, the Claimant does not indeed state, in the application, the grounds that form the basis of the application. It is actually the sworn statement filed in support of the application, which according to the rules is only supposed to verify the application, that now lays down the nature of the of the claim, the basis and the reliefs sought. On the basis of the application not complying with the Rules, this Court finds that it was irregularly brought.
17. On whether or not the Claimant's application for summary judgment is misconceived as it relies on the settlement in the Magistrate's Court as a basis for its application, when the pleadings before this court are at variance with those in the magistrate's court? The record will indeed show, as the Defendant correctly asserts, that the Summons before the High Court allege negligence on the part of the Defendant and also pleads *res ipsa loquitur* against the Defendant. On the other hand, the summons filed in the Magistrate's Court do not allege any negligence on the part of the Defendants. The Claimant only asserts that the powerlines over the Claimant's house are low lying and so should be removed. The Claimant then on account of those assertions, sought the following reliefs: an order requiring the Defendant to remove the LV OHL power line over the Defendant's grass thatched kitchen; Damages for inconvenience; costs of the action.
18. In the Magistrates Court, the Claimant filed a Statement of Claim, drafted as follows:

STATEMENT OF CLAIM

- *The Plaintiff stays at Mchangautuba in the City of Mzuzu(misspelling not mine)*
- *The Defendant is a statutory corporation licensed under the Electricity Act to produce, transmit and distribute electricity in the Republic of Malawi.*
- *Over the Plaintiff's grass-thatched kitchen, there is a low lying LV OHL power line that is posing a danger to the occupants of the house.*
- *The Plaintiff reported the issue to the Defendant's Mzuzu offices to remove the low-lying LV OHL power line after an incident occurred in which the Plaintiff was injured*
- *The Plaintiff has been making follow up several times but to no assistance has been offered to the Plaintiff despite the Defendant's employees promising to remove the LV OHL line.*

WHEREFORE the Plaintiff claims for the following:

- An order requiring the Defendant to remove the LV OHL power line over the Defendants grass thatched kitchen.*
- Damages for inconvenience;*
- Costs of this action.*

Dated this6th day of..... December..... 2019

MESSRS MBULO ATTORNEYS AT LAW

(Legal Practitioners for the Plaintiff)

19. In the High Court, the statement of case was framed as follows:

STATEMENT OF CASE

- *The Claimant is a business lady who stays at Mchengautuba in the City of Mzuzu.*
- *The Defendant is a statutory corporation licensed under the Electricity Act to produce, transmit and distribute electricity in the Republic of Malawi.*
- *The poles carrying power transmission lines owned and managed by the Defendant herein were at all the material times located within the aforementioned residential area.*
- *The Defendant's power lines (LV OHL) dissected the Claimant's plot and were elected over the Plaintiff's grass-thatched kitchen, there is a low lying LV OHL power line that is posing a danger to the occupants of the house.*

- *On or about the 4th September 2018, around 13:30 hours the Claimant was cooking inside her grass thatched kitchen.*
- *As the Claimant was cooking there were sparks on the power line which caused the grass thatched kitchen under it to catch fire and burn the whole roof which fell on the Claimant as she was trying to escape the fire.*
- *Due to negligence of the Defendant by electing a power line over the kitchen of the Claimant, the Claimant suffered damage and loss for which the Defendant herein is liable.*

PARTICULARS OF NEGLIGENCE

- FAILURE by the defendant to ensure that power transmission lines are elected in strategic position to avoid the risk of injuring occupiers of the land;*
- Failure to avoid occurrence of sparks at the power transmission lines*
- Failure to take quick and adequate measures so as to prevent electricity from injuring the claimant.*

In the alternative, the Claimant pleads the doctrine of Res ipsa loquitur.

PARTICULARS OF LOSS AND DAMAGE

As a result of the negligence of the Defendant, the Claimant sustained serious injuries and the particulars are as follows:

- Full thick burns around the fore head*
- Swollen eyelids;*
- Scars on the nose;*
- As a result of the said serious injuries, the Claimant now has eye problems as she cannot see properly;*

WHEREFORE the Claimant claims:

- *Damages for pain and suffering;*
- *damages for loss of amenities of life;*
- *damages for disfigurement*
- *Damages for hospital expenses;*
- *An order that the Defendant's should remove the power transmission line lying over the Claimant's grass thatched kitchen.*
- *Costs of this action.*

20. The guiding principle to follow when deciding whether or not to enter a summary judgment is that stated in Order 12, rule 26 of the Courts (High Court) (Civil Procedure) Rules 2017. It states:

"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."

21. The question now is, in view of the arguments from the parties herein, should this Court enter a summary judgment in favour of the Claimant herein? The answer is in the negative for a number of reasons.

22. The first reason relates to the reasons given in paragraph 17 to 19 above.

23. Second reason is that, this court, having looked at the parties' arguments is satisfied that there is a relevant dispute of facts between the parties herein. As the defendant rightly points out, in the first place, the Claimant in her statement of case at paragraph 4 alleges that the defendant's power lines LV-OHL dissected the Claimant's plot and were erected over the Claimant's grass thatched kitchen. Then in paragraph 6 she alleges that as she was cooking there were sparks on the power line which caused the kitchen to catch fire and the whole roof got burnt and fell on the Claimant as she was trying to escape. The medical report on the other hand indicates that the Claimant was electrocuted by ESCOM wires on the face.

24. Further, the Defendant's argument in response to the allegation is that the Defendant never erects power lines over houses and that the Claimant built her kitchen after the powerlines were already erected. The Claimant then will need to prove her claim, which ever it is, as it is there are two different versions of what actually transpired from the Claimants side which the Defendant is questioning,; and

25. The Defendant too has a different story as to the erection of the powelines which is at variance with the Claimant's. Whereas the Claimant in her statement of case at paragraph 4 alleges that the defendant's power lines LV-OHL dissected the Claimant's plot and were erected over the Claimant's grass thatched kitchen Defendant on the other hand counter argues that they had erected their power lines way before the Claimant had built her kitchen and that the defendant does not erect power lines above buildings.

26. In paragraph 6 of the defence, the Defendant also disputes that the power lines were low lying as proper care is at all material times exercised on all electric polls and transmission cables. The Claimant has to prove the assertion that the lines were low lying.
27. It is in view of these divergent views that this Court considers that there exists a relevant dispute between the parties on the question of facts.
28. The other reason relates to the fact that the matter had been settled before at the Principal Resident Magistrate's Court by consent. In paragraph 7 of the Claimant's statement in reply to the defendant's sworn statement in opposition to the application for summary judgment, the Claimant states that the pleadings in the present matter and those in the magistrates Court summons are not at variance as they arise from the same facts that the defendant erected a low-lying LV-OHL power line over the Claimant's grass thatched kitchen.
29. The Claimant then went on to state that the relief on paragraph (e) of the High Court summons on page number 2 of the statement of case is the same as the relief that was sought in the Magistrate Court summons, that is, an order that the defendant should remove the power line lying over the Claimant's grass thatched kitchen.
30. The Claimant also alleged in its paragraph 10 that the admission by the defendant to remove the LV-OHL power line within 60 days and to pay damages in the Magistrate Court clearly means that the defendant accepted wrong doing. To which the respondent replies and argues that an entry of a consent order before the magistrate's court does not amount to the admission of liability.
31. During the hearing of the application, the Claimant's counsel did indicate that damages for the inconvenience were paid by the respondent and to them this was a clear indication of admission of liability. That the defence entered by the respondent, that the claimant's kitchen was built after the power lines were erected does not have any prospect of success.
32. The Claimant also made reference to the defence filed by the respondent herein at the CRM's court and compared it with the defence in the present matter and surmised that it was clear that the argument that the power lines were erected before the kitchen was built was an afterthought or it would have been raised at the lower court.

33. In response to the Claimant's assertions, the defendant rightly argues, and this Court agrees, that an out of court settlement can be arrived at for a variety of reasons, at times, the cost of litigation might be high and so a party may decide to settle to avoid the inconvenience. The Defendant further argues that the settlement before the Magistrate Court is a mere compromise and did not refer to an admission of negligence. Looking at the consent order in question, there is indeed no admission of liability on the Claims made, and none will be inferred from it.
34. The Defendant also argues, and rightly so, that the Summons before the Magistrate Court do not allege any negligence against the Defendant, and did not contain any particulars of negligence against the Defendant whereas the Summons before the High Court do. This Court rather agrees with the Defendant herein in that the cause of action in the Magistrate's court was essentially different from that in the High Court. Therefore the Claimant has to prove the claims made in this Court as the Consent order relied on does not in any way cover the negligence that is alleged in the instant case.
35. In the final analysis, this Court finds that there is a relevant dispute of fact between the parties herein, and both parties need to adduce their evidence to prove their assertions at trial.
36. One other observation this Court makes relates to paragraph 16 of the Claimant's sworn statement filed in support of the application for summary judgment in which the Claimant claims that in January 2020 the Claimant moved to Blantyre, and after observing that the defendant was not paying compensation, commenced the present proceedings for damages for pain and suffering, damages for loss of amenities of life;
37. It would appear to this Court that the motivation and reason for these proceedings are clearly stated in paragraph 6 of the sworn statement above, that *'after observing that the defendant was not paying compensation commenced the present proceedings for damages for pain and suffering, damages for loss of amenities of life.'*
38. This Court finds this approach very peculiar. For one, it would appear to this Court that the Claimant is trying to enforce the judgment of the lower Court via the current proceedings in this Court by stating that the defendant's noncompliance to the earlier consent agreement signed by the parties in the lower Court is the reason for the action instituted in the High Court.

39. There is no assertion and certainly no evidence before this Court that the earlier consent order was set aside. The Claimant clearly states and only uses the defendant's noncompliance thereto as a reason for instituting the present proceedings in the High Court and for arguing their case for summary judgment.
40. This Court finds this approach very strange and procedurally untenable. If that consent agreement was reached between the parties, then the Claimant had no business filing a new claim just because there was a failure of compliance on the part of the Respondent.
41. The correct legal course to follow procedurally in view of such a default is to go to the very Court before whom the agreement was entered and apply for enforcement thereof. The present course taken by the Claimant has no legal basis.
42. The implication of the Claimant's approach is that if there was compliance, the present action would not have been taken out against the defendant herein. Meaning, the main issue is the implementation of the consent order dated 29th January 2020. How does the Claimant justify such an approach at law when enforcement of the consent is a possibility?
43. It would have made sense if the Claimant was seeking the intervention of this Court in order to enforce the Consent order as that is provided for under the law. See section 11(of the Courts Act Cap 3:02 of the Laws of Malawi which states as follows;
Without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have— (a) jurisdiction— (vi) to enforce a judgment of the High Court or a subordinate court in any manner which may be prescribed.
44. In view of the disputes of facts highlighted above, and pursuant to Order 12 rule 26 of the Courts (High Court) (Civil Procedure) Rules 2017, it is this Court's considered view that this not a matter that is amenable to disposal by way of summary judgment. Therefore the application fails and is dismissed with costs.

Made in Chamber this 6th day of August 2021.


A. Kanthambi

JUDGE