



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO. 668 OF 2018**

**BETWEEN**

**LILONGWE CITY COUNCIL ..... CLAIMANT**

**-AND-**

**KHULEYA ..... DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

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**ORDER**

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*Kenyatta Nyirenda, J.*

On 19<sup>th</sup> December 2018, the Claimant filed with the Court an ex-parte application for a judgement in default. The application is brought under Order 12, rules 6, 7 and 8, of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as “CPR”].

The background to the application is of the simplest. On 10<sup>th</sup> August 2018, the Claimant commenced an action against the Defendant by a specially endorsed writ of summons (Summons). The Statement of Case reads as follows:

- “1. *The Claimant is a statutory body whose principle place of business is Civic Offices, City Centre, P.O. Box 30396. Capital City, Lilongwe.*
2. *The defendant is registered as the proprietor of Plot Number 18/49 and as the proprietor of the said property, the Defendant is obliged to pay city rates to the Claimant.*
3. *However, the Defendant has wrongfully and unlawfully neglected to pay city rates such that the city rates have amounted to MK5,060,247.25 in arrears.*

4. *The Claimant has since published in the Nation Newspaper of 12<sup>th</sup> July, 2017 and the Malawi Government Gazette dated 17<sup>th</sup> July, 2017 a list of all defaulters of city rates and the Defendant is on the list of defaulters.*

**WHEREFORE**, *the Claimant claims:*

1. *The sum of MK5,062,247.25 and interest on MK5,060,247.25 at 1 % above the base lending rate of National Bank Plc from the date the claim arose to the date the claim is settled in full, or in the alternative the statutory interest rate applicable.*
2. *An order that the Claimant sells the property known as 18/49 in order to recover the outstanding sum of MK5,060,247.25.*
3. *Costs of this action.”*

The application is supported by a statement sworn by Counsel George James Naphambo wherein he states that (a) the Defendant was on 22<sup>nd</sup> August 2018 served with the original copy of the Summons, including the Statement of Case, (b) as of 22<sup>nd</sup> October 2018, the Defendant had neither filed nor served a response or a defence and (c) the time period required for the same has since expired.

The application was taken before the learned Assistant Registrar, Her Honour Chimwaza, who opted to exercise the powers conferred on her by Order 25, rule 2, of CPR by referring the application to this Court. It might not be out of place to quote, in part, the referral by the learned Assistant Registrar:

*“This court received numerous summons filed by Naphambo and Company commencing action on behalf of Lilongwe City Council claiming city rates and ground rates from various residents of Lilongwe city plus 1% interest above bank lending rate on the principle sum. See the files attached.*

*Upon scrutinising the statements of case and sworn statement and the attendant relief being sought by the claimants, it is viewed that the matters are of commercial nature as such they ought to have been commenced in the Commercial division of the High Court.*

*It is noted My Lord that, the current High Court Civil Procedure Rules, 2017 do not specify what should constitute a commercial matter. However the former Commercial Court Rules from which the current rules are borrowed from had a specific provision on the minimum amount to be commenced in the commercial court to be from K1,000,000.00.*

*The current rules have left the monetary jurisdiction silent and this is likely to create a floodgate of commercial claims in the general division thereby defeating the purpose of having the Commercial Court as a special division with its special commencement and filing fees.*

*I therefore submit the above files for guidance and directions on how to proceed on such claims.”*

I have considered the application. The all-important question is which Division of the High Court has competence over the present action.

The Criminal Division, the Family and Probate Division and the Revenue Division can be eliminated without much ado. The present action is clearly not a criminal matter. It is also neither a family matter nor a probate matter.

With regard to the Revenue Division, it has jurisdiction over matters concerning taxes, duties, levies, etc, collected under the written laws set out in the Schedule to the Malawi Revenue Authority Act, namely, Customs and Excise Act, Taxation Act and Value Added Tax Act: see the definition of “revenue matter” in section 2 of the Courts Act.

The subject matter of the present proceedings, that is, city rates, are levied or imposed under the Local Government Act and the said Act is not included in the Schedule to the Malawi Revenue Authority Act. In short, the present action is not a “revenue matter”, as defined by section 2 of the Courts Act.

The toss-up then is between the Civil Division and the Commercial Division. On this question, section 6A of the Courts Act, as read with section 2 thereof, are relevant.

Section 6A establishes specialized Divisions of the High Court and the provision is couched in the following terms:

*“(1) The High Court shall have the following specialized Divisions-*

- (a) the Civil Division which shall hear civil matters not provided for under another Division of the High Court;*
- (b) the Commercial Division which shall hear any commercial matter;*

- (c) *the Criminal Division which shall hear any criminal matter;*
  - (d) *the Family and Probate Division which shall hear any family or probate matter; and*
  - (e) *the Revenue Division which shall hear any revenue matter.*
- (2) *Where a person commences a matter or makes an application in a division other than the appropriate division in accordance with this section, the registrar shall, on his own volition or on application, immediately transfer the matter to the appropriate division.*
- (3) *The Courts may order that any costs arising from the process under subsection (2) shall be borne by the party who commenced the matter in an inappropriate division.* –  
Emphasis by underlining supplied

Section 2 of the Courts Act defines “civil matter” and “commercial matter” as follows:

*“civil matter” means a civil matter that is not a commercial, criminal, family or probate matter;*

*“commercial matter” means a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not, including—*

- (a) *the formation or governance of a business or commercial organization;*
- (b) *the contractual relationship of a business or commercial organization;*
- (c) *liabilities arising from commercial or business transactions;*
- (d) *the restructuring or payment of commercial debts;*
- (e) *the winding up of companies or bankruptcy of persons;*
- (f) *the enforcement or review of commercial arbitration award;*
- (g) *the enforcement of foreign judgments of commercial matters subject to the provisions of the law;*
- (h) *the supply or exchange of goods and services;*
- (i) *banking, negotiable instruments, international credit and similar financial services;*
- (j) *insurance services; or*
- (k) *the operation of stock and foreign exchange markets,*

*in the event of doubt as to whether a matter is commercial or not, the judge at the outset or during the course of the action, shall have power to resolve the issue;*” - Emphasis by underlining supplied

When considering the definition of "commercial matter", it is important to bear in mind that paragraphs (a) to (k) inclusive merely set out a few examples of matters that fall within the phrase, which is in the chapeau of the definition, that is, "*a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature, whether contractual or not*". As long as a civil case is of commercial significance and it arises out of, or connected with, any relationship of commercial or business nature, it qualifies as a commercial matter.

In the present proceedings, the Claimant is a business entity (see paragraph 1 of the Statement of Case) and it is claiming outstanding city rates in the sum of K5,060,247.25 plus interest at 1% above the base lending rate and costs. There is clearly a debtor/creditor relationship between the two parties. Subject to qualifications to be stated shortly, such a relationship falls within the meaning of "commercial matter", as per the definition of that term in section 2 of the Courts Act.

That said, I have now to turn to the specific issue raised by the learned Assistant Registrar, that is, what is the minimum monetary value, if any, that has to be attached to a dispute for it to qualify as "a civil matter of commercial significance"?

I fully agree with the learned Assistant Registrar that it would be highly inappropriate and inadvisable to allow disputes involving nominal amounts to go to Commercial Division: there has got to be a cut-off point.

One of the factors to consider in deciding whether or not an action falls within "a civil matter of commercial significance" is the amount involved. As already determined, the present proceedings arise out of, or are connected with, a debt owed by the Defendant to the Claimant in respect of city rates in the sum of K5,060,247.25.

Under Order 1, rule 6, of the High Court (Commercial Division) Rules, the Commercial Division had jurisdiction to deal with, try and determine any commercial matter where the amount in dispute or the value of the subject matter was not less than K1,000,000.00. The High Court (Commercial Division) Rules were revoked in 2017 by the Courts (High Court) (Civil Procedure) Rules. In the circumstances, the threshold of K1, 000,000.00 no longer applies. Despite the said revocation, the sum still serves as a useful guide (the word "guide" is used advisedly)

in seeking to determine the value or amount that would fall within “a civil matter of commercial significance”.

The threshold of K1,000,000.00 was introduced in 2007. Taking into account the realities of inflation and/or devaluation of the Kwacha over the last 11 years, it seems to me, in my-not-so fanciful thinking, that the cut-off point has now to be K2,000,000.00.

I am fortified in my view that the sum of K2,000,000.00 should be the cut-off point by the fact that the maximum civil jurisdictional limit of the Magistrate’s Court in terms of monetary value is K2,000,000.00. I have no doubt that Parliament had this fact in mind when it chose to define a commercial matter as “a civil matter of commercial significance”.

The upshot of the foregoing is that claims for city rates not exceeding the sum of K2,000,000.00 must be commenced in the Magistrate’s Court. Where, on the other hand, the outstanding city rates exceed K2,000,000.00, the proceedings have to be in the Commercial Division.

Based on the amount involved in the present matter, that is, K5,060,247.25, I have no hesitation in holding that the present matter qualifies as “a civil matter of commercial significance”. In terms of section 6A of the Courts Act, it is the Commercial Division, and not this Division (Civil Division), that is charged with hearing commercial matters such as the one herein. In the premises, this matter has to be transferred to the Commercial Division. I, accordingly, order the immediate transfer of these proceedings to the Commercial Division.

Before resting, I wish to point out that the mere commencement of a matter in an inappropriate Division does not render the matter null and void. Section 6A (2) of the Courts Act makes provision for a matter commenced in an inappropriate

Division to be transferred to the appropriate Division. It is commonplace that a nullity (nullified proceedings) cannot be the subject of a transfer: there would be nothing to transfer. Had it been that Parliament intended that an action commenced in a wrong Division should be rendered null and void, section 6A of the Courts Act would have addressed the matter with clarity and directness.

Finally, for the sake of completeness and to remove any doubt, the commencement and filing fees applicable to proceedings in the Commercial Division will have to be paid by the Claimant.

Pronounced in Court this 23<sup>rd</sup> day of January 2019 at Lilongwe in the Republic of Malawi.

**Kenyatta Nyirenda**  
**JUDGE**