IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 416 OF 1979

BETWEEN:

SUBASH C. BOURI ..... PLAINTIFF

-and-

KADERVILLE V. MUDALLIAR ..... DEFENDANT

Coram:- Unyolo - J
Msiska of Counsel for the Plaintiff
Chizumira of Counsel for the Defendant
Kaundama - Court Clerk

R U L I N G

This is an application on the part of the plaintiff for summary judgment against the defendant in this action for the sum of K25,534.

The history of the matter is as follows. By his writ dated 22nd July, 1979 and statement of claim filed therewith, the plaintiff claimed from the defendant the sum of K30,534 being money payable by the defendant for money allegedly had and received by the defendant for the use of the plaintiff. Alternatively the plaintiff claimed the said sum of K30,534 on the basis of an account. Further, the plaintiff claimed interest on the said sum at such rate and for such period as to the Court might seem just. And on the 9th August, 1979 the plaintiff obtained judgment for the said sum of K30,534 plus interest to be assessed, the defendant having entered no appearance in the action. However, that judgment was subsequently set aside by Jere, J. and the defendant given leave to file a defence. The defence was indeed filed. It is quite a lengthy defence wherein the defendant denies owing the plaintiff the sum claimed or at all and further denies each and every allegation contained in the plaintiff's statement of claim. I will have more to say on this aspect later.

Then came the present application and, as I have indicated earlier, the plaintiff applies for final judgment for the sum of K25.534. It is said that this sum represents the balance outstanding on the K30,534 claimed in the statement of claim. There is an affidavit sworn to by counsel for the plaintiff in support of the application. It is a lengthy document in which the deponent deals with the divers matters raised by the defendant in his defence and avers that the said defence

is"a sham defence filed purely for the purpose of delay and has no merit whatsoever". A number of documents are also exhibited.

This appears to be a convenient juncture to deal with one of the points taken by Mr. Chizumila, counsel for the defendant, at the hearing of the application. Mr. Chizumila has submitted that the application here is irregular and defective in that the affidavit deposed in support thereof does not comply with the rules - O.14/2 of the R.S.C., to be precise.

The starting point is O.14/2/4. The relevant part of this Rule provides as follows:

> "Plaintiff's Affidavit - It is a necesary condition for proceeding under O.14 that the application must be supported by an affidavit which complies with this Rule, otherwise the summons may be dismissed."

The Rule goes on to further provide that such affidavit must fulfil two requirements one of which is that it must state the deponent's belief that there is no defence to that claim or part, or no defence except as to the amount of any damages claimed. And O.14/2/6 makes it clear that such a statement is an essential part of the affidavit and that the usual words used in the affidavit are, " I verily believe that there is no defence to this action".

Such words have however not been used in the plaintiff's affidavit here. What Mr. Msisha relies on is the averment made in paragraph 6 of the affidavit where is is stated, "that the defendant's defence is a sham defence filed purely for the purpose of delay and has no merit whatsoever". Mr. Chizumila has however urged that such a statement does not comply with the Rule herein.

Pausing there for a moment, it is to be noted that applications under O.14 are usually made when the defendant has just given notice of his intenition to contest the proceedings; before a defence has actually been served. Indeed it appears that the primary intention of the Rule was that such an application should be made before a defence has been delivered. See McLardy v. Slaetum (1890) 24 QBD 504. The requirement that there should be a statement on the plaintiff's affidavit deposing to the belief that there is no defence to the action seems logical in such circumstances. The position in the present case is however different. The defendant had already filed a defence at the time the affidavit was deposed to. However it is trite, and I would also refer to the McLardy v. Slateum case, that

applications under the Rule may be brought even after a defence has been delivered. But in my judgment even there the plaintiff must in his affidavit still swear to the belief that the defendant has no defence to the action, that being the basis upon which applications under the Rule are brought.

I have carefully considered the averment made in the Plaintiff's affidavit under paragraph 6 namely, "that the defendant's defence is a sham defence filed purely for the purpose of delay and has no merit whatsoever". With respect, I think that what the deponent is saying there, in different words of course, is that the defendant has no defence to the action and that what has been put forward as a defence is only a sham defence, meaning, I suppose, that the same is pretended and not genuine. Looking at the matter in that light I come to the conclusion that the affidavit here does comply with the Rule. I am therefore unable to accept Mr. Chizumila's submission on this aspect.

The matter does not however end there. It is to be observed that the summary jurisdiction conferred by O.14 must be used with great care and that a defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion. See O.14/3-4/7. As a matter of fact the defendant need not at that stage show a complete defence. All he needs to show is that there is a triable or arguable issue or question or that for some other reason there ought to be a trial. O.14/3-4/8 is also pertinent. It provides that wherever there are circumstances which require to be closely investigated there ought to be a trial and judgment should not be given under O.14.

Referring to the pleadings, the plaintiff's case is that he and the defendant together with one S.R. Patel were at all material times carrying on business as partners in a dairy business under the name and style of Mapanga Dairy, with the defendant as the managing partner. He pleads that the said business and all its assets were sold as a going concern on the 15th January, 1976. The amount claimed in this action is said to have accrued from that business and, as I have indicated earlier, the plaintiff's action is for money had and received.

And turning to the defence, the defendant does not dispute that the partnership business under the name of Mapanga Dairy did exist. He denies however that the plaintiff was ever a partner in that business. He pleads that the plaintiff voted himself out of the said partnership, so to speak, by failing to comply with two essential provisions of the partnership agreement in that (a) the plaintiff failed to pay his share of

the capital of the partnership, and (b) that the plaintiff failed to participate in the day to day running of the business. On these and other facts the defendant contends that the plaintiff cannot be heard to say he has any claim to the profits of the said partnership.

In my judgment the defence does show that there are issues both of law and fact to be determined in this action. I have carefully considered what has been deposed to in the plaintiff's affidavit and have similarly considered the exhibits filed therewith. With respect I do not think that on their own these resolve the questions raised by the defendant in his defence. Perhaps I should mention that exhibit "IS6" did bother me initially. However, a lot has been said regarding the circumstances in which the said exhibit was written and how the payment indicated therein was made. All in all it is clear when all the facts are considered together that there are in this case circumstances which require to be closely investigated if justice is to be done, and in my view that can properly be done in a full trial of the action.

Accordingly the application fails and it is dismissed the defendant is hereby given leave to defend the action. Costs of this application to be the defendant's in any event.

Delivered in Chambers this 19th day of September, 1985 at Blantyre.

L.E. Unyolo
JUDGE