

Civil Procedure - Application of
Ord. 14 of RSC

**IN HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO. 1209 OF 1999

BETWEEN:

GRACE P. SINALO PLAINTIFF

AND

THE ADMINISTRATOR GENERAL DEFENDANT

CORAM : POTANI, DEPUTY REGISTRAR
Msisha, Counsel for the Plaintiff
Tsingano, Counsel for the Defendant

RULING

The plaintiff's action is for damages for waste, loss and neglect of property belonging to the estate of the her deceased husband, late Felix Sinalo. Such property is situated at Chitawira in the City of Blantyre and consists of a factory, some equipment and machinery. The plaintiff further claims interest on the damages to be awarded at 48 percent per annum, prevailing commercial lending rate or such other rate as the court may deem fit.

Pursuant to order 14 of Rules of the Supreme Court Practice, the plaintiff took out summons for summary judgement and in support thereof, there is the affidavit of the plaintiff, Grace Sinalo. There is also the affidavit of Moses Francisco Tsigano, of counsel for the defendant, in opposition.

It is not disputed that due to competing claims over her late husband's estate, the plaintiff initiated proceedings in the High Court of Malawi under Civil cause Number 544 of 1995 for purposes of protecting the estate. She subsequently obtained a court order appointing the defendant as interim administrator of the estate and that order specifically directed that the defendant should take control of the estate and protect it pending the granting of letters of administration. Before the defendant took over the estate, an inventory, exhibited to the affidavit in support as 'GS1', was prepared.

It is alleged by the plaintiff, in her affidavit in support, that subsequent to the taking over of the estate by the defendant, she received persistent reports from the police and some sympathisers that part of the estate, Famba Furniture, was not being properly protected and was being vandalised. This was brought to the attention of the defendant. After the court in Civil Cause Number 544 of 1995 gave judgement in favour of the plaintiff on December 23, 1998, a stock of the estate was taken before the plaintiff took over whereupon it was discovered that a number of items were either missing or destroyed and the document showing the state of affairs at that time has been exhibited as 'GS3'. Due to the damage the property suffered, need arose for the plaintiff to effect repairs whose cost is shown in exhibits 'GS4' and 'GS5'.

Counsel for the defendant has raised two grounds of objection to the application. Firstly it is the defendants averment in paragraph 3 of the affidavit in opposition that the matter involves so many and complex issues. According to the defendant, this is evident from the nature and size of the affidavit of the plaintiff in support of this application. Secondly, the defendant, in paragraph 4 of the affidavit in opposition, contends that the affidavit in support is defective as it does not state the plaintiff's belief that there is no defence to her claim when in fact a defence was served which has been exhibited to the affidavit in support as 'MFT'.

On the first ground of objection, it is quite true that the exhibits to the affidavit in support is quite lengthy with 31 paragraphs and the exhibits thereto are quite voluminous. However, that, in itself, cannot be a ground for finding that the application is outside the scope of order 14. It remains to be ascertained whether or not the issue at stake is a short one and should the answer be in the affirmative, the court ought to determine the matter regardless of how bulky the affidavit and exhibits are. In the present case, the issue is fairly simple as it relates to how the defendant administered the items forming the deceased's estate which he took over following a court order as listed in 'GS1' as compared to the state of such items at the time they were handed over to the plaintiff as listed in 'GS3' also following a court order. I would therefore hold the view that there is no complexity of the issues in this case.

As regards the alleged defect in the affidavit in support, counsel for the plaintiff admits that the affidavit does not expressly depose as to the plaintiff's

belief that the defendant's defence is a mere sham. However, counsel for the plaintiff argues that the import of paragraph 30 of the affidavit in support is such that it expresses the plaintiff's belief that the defendant's defence is unsustainable.

To begin with, it is clear from practice note 14/2/8 that it is an essential requirement that the affidavit in support of an application like the one before the court should contain an averment by the plaintiff on the belief that there is no defence to the claim or where a defence has been served, that it is mere sham. The practice note actually prescribes the wording such averment should take namely "I verily believe that there is no defence to the action". Paragraph 30 of the affidavit in support which the plaintiff seeks to rely on as having satisfied such a requirement does not come any closer to the recommended wording. It merely analyses the defendant's defence.

Counsel for the defendant has argued that in terms of Practice note 14/7/2, one of the grounds for dismissing an application of this nature for being not within order 14 is where the affidavit in support is defective as in the case where there is an omission to state the deponent's belief that there is no defence to the claim. This, I agree, is a correct statement of the law. However, under the same practice note, the court is empowered to grant leave to the plaintiff to file further affidavit evidence in order to cure any defects or omissions in the original affidavit. In my view, this is an appropriate case where such leave should be granted. It is therefore ordered that within 7 days from August 1, 2000, the plaintiff should file a supplementary affidavit to be filed with court and served on the defendant who shall be at liberty to file and serve an affidavit in response, if any, within 7 days thereafter.

I reserve the issue of costs until the full determination of the application.

Made in Chambers this day of July 21, 2000, at Blantyre.


H.S.B. Potani
REGISTRAR

