



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION

PERSONAL INJURY CAUSE NUMBER 758 OF 2014

(Before Hon. Justice Mambulasa)

BETWEEN:

CHISOMO DULAMANJA.....CLAIMANT

-AND-

SHARMA INDUSTRIES.....DEFENDANT

CORAM: HON. JUSTICE MANDALA MAMBULASA

Mr. David Kanyenda, Advocate for the Claimant

Mr. Patrick D. Kalanda, Advocate for the Defendant

Mr. Obet Chitatu, Court Clerk

ORDER

MAMBULASA, J

Introduction

- [1] The Claimant commenced this action against the Defendant on or about 30th July, 2014 claiming damages for pain and suffering, loss of amenities of life, disfigurement, false imprisonment, special damages for procuring a medical report and costs of the action. On 2nd September, 2014, the Claimant filed an amended Writ of Summons and Statement of Claim and they were issued by the Registrar on the same day. These were duly served on the Defendant on the same day.
- [2] The Defendant on its part, filed and served its Defence in the matter on or about 3rd September, 2014.
- [3] By an *ex-parte* Summons made on 13th January, 2015 by the Claimant, the Court granted an order exempting this matter from mediation and for it to proceed to trial accordingly.
- [4] On 10th July, 2015 the parties executed a Consent Order for Directions. In terms of paragraph 8 thereof, the Defendant filed an amended Defence on the same day.
- [5] In compliance with the said Consent Order for Directions, the Claimant filed and served its List of Documents on the Defendant on 17th August, 2015. However, since 17th August, 2015 the Claimant has not taken any step or action to further prosecute the matter herein.
- [6] It is because of the inaction or inactivity on the part of the Claimant that the Defendant, on 30th January, 2020 filed a without notice application to strike out proceedings pursuant to Order 12, rule 56 of the Courts (High Court) (Civil Procedures) Rules, 2017.

- [7] On 20th October, 2021 when this Court became seized of the matter, it ordered that the application should come with notice and it was assigned a date on 7th December, 2021.
- [8] The Claimant opposed the application and filed all the relevant documents.
- [9] During the hearing of the Defendant's application to strike out the proceedings herein, this Court requested the parties to address it on whether the application was properly brought before it in view of the dictates of Order 35, rule 15 (1) and (2) of the Courts (High Court) (Civil Procedures) Rules, 2017.

Issue for Determination

- [10] The only issue for determination before this Court is whether the application to strike out proceedings by the Defendant is properly before it given that the proceeding is stayed and there has not been any application to have the said stay vacated first.

The Law

- [11] Order 35, rule 15 of the Courts (High Court) (Civil Procedures) Rules, 2017 provides as follows:
- (1) Where an existing proceeding has not come before the Court between the commencement date and a period of 6 months from the commencement date, the proceeding shall be stayed.
 - (2) Any party to the proceeding may apply for the stay to be vacated.

(3) Proceedings of the following types will not be stayed as a result of this provision-

- (a) where the case has been given a fixed trial date which is after a period of 6 months from the commencement date;
- (b) personal injury cases where there is no issue on liability but the proceeding has been adjourned by court order to determine the prognosis of the claimant;
- (c) where the Court is dealing with the continuing administration of an estate or a trust or a receivership; or
- (d) applications relating to funds in Court.

(4) For the purposes of this rule, a proceeding shall not be an “existing proceeding” once the final judgment has been given.

[12] Order 35, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 defines, “commencement date” to mean the date of coming into force of these Rules. It also defines, “existing proceeding” to mean a proceeding commenced before the commencement date.

[13] Order 35, rule 2 states as follows:

This Order deals with the application of these Rules to an existing proceeding **before the commencement date.**

Application of the Law to the Facts

- [14] It is common knowledge that the Courts (High Court) (Civil Procedure) Rules, 2017 came into force on 3rd October, 2017. That, is therefore, the commencement date of these Rules.
- [15] An “existing proceeding” has been defined under Order 35, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 to mean a proceeding commenced before the commencement date. In this case, this proceeding was commenced on or about 30th July, 2014. Consequently, there cannot be any doubt whatsoever that it is an existing proceeding.
- [16] This Court is aware that the intention of Order 35, rule 2 of the Courts (High Court) (Civil Procedure) Rules, 2017 was to deal with the application of these Rules to an existing proceeding **before the commencement date** (*Emphasis supplied*).
- [17] However, Order 35, rule 15 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 specifically extends the period from **before the commencement date** to now **between the commencement date and a period of 6 months from the commencement date**. Sub-rule 1 of rule 15 must therefore be given its effect notwithstanding what rule 2 provides.
- [18] Applying Order 35, rule 15 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 to the circumstances of this case, as an existing proceeding, it definitely did not come before the Court between 3rd October 2017 and 3rd April, 2018. It should be recalled that the

application to strike out proceedings by the Defendant was only taken out on 20th January 2020. It is therefore the finding of this Court that this matter was stayed by operation of law from 4th April, 2018 and remains so until now. It is also the further finding of this Court that this scenario, cannot be saved by sub-rules 3 and 4 of rule 15 of Order 35 of the Rules.

[19] In the absence of any application by either party to have the stay vacated first as per the dictates of Order 35, rule 15 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 this Court holds that the application to strike out proceedings by the Defendant was not properly brought before the Court. In passing, this Court observes that the wording or language of Order 35, rule 15 (2) of the Rules does not seem to permit the Court to lift the stay *suo motu*.

[20] This Court is acutely aware that it is required to give effect to the overriding objective of the Courts (High Court) (Civil Procedure) Rules, 2017 which is, to deal with proceedings justly, whenever it exercises any power conferred on it by these Rules, or interprets any written law, rules and regulations.¹

[21] The Defendant did not comply with the requirements of Order 35, rule 15 (2) of the Courts (High Court) (Civil Procedure) Rules, 2017 in this matter before bringing its application to strike out proceedings. Failure to comply with these Rules or a direction of the Court is an irregularity.²

¹ See Order 1, rule 5 (1) and (2) of the Courts (High Court) (Civil Procedure) Rules, 2017.

² Order 2, rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017.

[22] This Court has a number of options given to it to take under the Rules where there has been non-compliance. Order 2, rule 3 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides as follows:

3. Where there has been a failure to comply with these Rules or a direction of the Court, the Court may-

- (a) set aside all or part of the proceeding;
- (b) set aside a step taken in the proceeding;
- (c) declare a document or a step taken to be ineffectual;
- (d) declare a document or a step taken to be effectual;
- (e) make an order as to costs; or
- (f) make any order that the Court may deem fit.

[24] In the circumstances of this case, this Court has already found that this matter remains stayed. No any other step or proceeding could have been taken on it while the stay by operation of law imposed by Order 35, rule 15 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 remains in place. This Court consequently invokes its power under Order 2, rule 3 (a) and (b) of the Rules and orders that the application to strike out proceedings by the Defendant and the subsequent hearing of the same on 7th December, 2021 be and are hereby set aside. The Court makes no order as to costs.

Finding and Determination

[25] It is the finding and determination of this Court that this existing proceeding was stayed on or about 4th April, 2018 by automatic application of Order 35, rule 15 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 and remains so to date. The application to strike

out proceedings taken out by the Defendant in this matter was therefore not properly brought before this Court. To the extent that the matter remains stayed, no step or proceeding could have been taken on it without first vacating the stay. The application to strike out proceedings filed by the Defendant and the subsequent hearing of the same on 7th December, 2021 are set aside. Each party shall bear its own costs.

[26] Made in Chambers this 11th day of January, 2022 at Blantyre, Malawi.



M. D. MAMBULASA
JUDGE