IN THE SUPREME COURT OF APPEAL

CIVIL APPEAL NUMBER 10 OF 2021

(Being High Court of Malawi, Commercial Division, Lilongwe Registry, Commercial Case No. 37 of 2016)

BETWEEN

ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED (ESCOM) .....APPELLANT

AND

SAMSON EVANS KONDOWE t/a SAVEMAN INVESTMENT ..... RESPONDENT

CORAM: HON. CHIEF JUSTICE R.R. MZIKAMANDA SC
HON. JUSTICE L.P. CHIKOPA SC, DEPUTY CHIEF JUSTICE
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI SC, JA
HON. JUSTICE J. KATSALA SC, JA
HON. JUSTICE I.C. KAMANGA SC, JA
HON. JUSTICE M.C.C. MKANDAWIRE SC, JA
HON. JUSTICE D. MADISE SC, JA
HON. JUSTICE D. KAMANGA SC, JA
T. Roka and Chijere, of counsel for the Appellant
T. Chatupa, of counsel for the Respondent
Chimtande and Fundani, Court Clerks
Mutinti and Msimuko, Court Reporters

JUDGMENT

Hon. Mzikamanda SC, Chief Justice

1. I have read the opinion of Hon. Justice Katsala, JA herein. I entirely agree with it and I have nothing useful to add. For the reasons he has given, I allow the appeal.

Chikopa SC, Deputy Chief Justice

2. I have read in draft the opinion of Katsala JA and I agree with the reasoning and the conclusions therein. I too allow the appeal.

Kapanda SC, JA

3. I have had the opportunity to read in draft the judgment by Katsala, JA and I entirely agree with it. I too would allow the appeal.

Potani SC, JA

4. I too have read the judgement of Katsala herein and for the reasons he has given, I allow the appeal.

Katsala SC, JA

My Lord Chief Justice, My Ladies and My Lords,

5. This is an appeal against the judgment of Manda J sitting in the High Court, Commercial Division, at Lilongwe Registry, delivered on 9 October 2017 in favour of the respondent on a claim for damages for negligence following a fire that gutted the respondent's bakery in Area 36 in Lilongwe. The appellant being dissatisfied with the decision of the court below appeals to this Court seeking a reversal of the judgment.

6. The facts of the case are that the respondent is a businessman who trades under the style of Saveman Investments. He operates a bakery called Cookies Bakery in Area 36 in the City of Lilongwe. On the morning of 29 December 2015 the bakery caught fire and sustained extensive damage. The respondent attributed the fire to the appellant's fault. It was alleged that the fire was caused by sparks which had been seen on the electricity meter installed by the appellant. The appellant denied responsibility.

7. The respondent then took out proceedings in the Commercial Court, at Lilongwe Registry, claiming damages for the loss and damage he sustained as a result of the fire. It was averred that the fire was caused by negligence on the part of the appellant. But the appellant denied being negligent and averred, among other things, that if the bakery caught fire as alleged, the same was caused without any negligence on its part and in circumstances it had no control or knowledge of.

8. After a full trial the Judge found that there was no negligence on the part of the appellant. However, the Judge proceeded to find that the appellant had breached an implied warranty to supply goods of merchantable quality which resulted in the respondent suffering loss and damage. The Judge held that since the meter installed by the appellant at the respondent's bakery was identified as the source of the fire which destroyed the bakery, the appellant is liable for all the losses suffered by the respondent and is liable to pay damages. Consequently, the Assistant Registrar assessed the damages at US$70,980.00 being cost of replacement of the bakery equipment and the cost of shipping it from China to Lilongwe. He declined to award damages for loss of profits having found that the respondent failed to prove them.

9. The appellant being dissatisfied with the judgment now appeals to this Court on three grounds, namely: -

    a. The Court below erred in law in holding that the defendant breached an implied warranty to supply goods of merchantable quality (being the meter) to the plaintiff when the issue of breach of warranty was not pleaded.

    b. The Court below erred in law in finding the defendant liable for all losses occasioned to the plaintiff despite finding/holding that there was no negligence on the part of the defendant.

    c. The decision of the Court below was against weight of the evidence.

10. The respondent's claim was in negligence. The relevant paragraphs in the statement of claim averred as follows: -

    "8. The plaintiff avers that the defendant, its servants or agents were extremely negligent and outright reckless and lacked good judgment and workmanship by installing in the plaintiff's bakery a used meter which was not suitable for the plaintiff's business having regard to the machines and equipment in the bakery.

    9. Particulars of negligence

(a) Using aluminum instead of copper wire to go into the previous meter in the plaintiff's bakery.

(b) Installing a used meter as a replacement of the previous meter when similar sparks had happened on the previous meter

(c) Installing a second hand or used meter which was not fit for the machines in the plaintiff's bakery, a thing the defendant's technicians as experts ought to have known

(d) Using a wire unknown to the plaintiff to install the replacement meter when the plaintiff had bought a new copper cable purchased by him from AT Carter at the defendant's demand

(e) Failing for sometime to rectify the problem of sparks on the defendant's pole near the plaintiff's bakery which was a problem that the defendant, its servants or agents had been aware of for sometime and had on a number of times incompetently attempted to rectify but failed until this happened

(f) Supplying excessive voltage to the plaintiff's machines

10. And the plaintiff shall rely on the doctrine of res ipsa loquitur.

11. As a result of the said negligence, the plaintiff suffered damage and loss due to the fire which erupted..."

6. From the pleadings exchanged, it was clear to both parties that the claim was founded in negligence. The plaintiff's case was that the fire was caused by the defendant's negligence. The defendant's case was that it was not negligent and was not responsible for the fire or the loss and damage the plaintiff suffered. It was also clear that the plaintiff had the duty to prove the negligence as alleged in order to succeed in his claim failing which, the claim would fail.

7. On page 1 of its judgment delivered, the Court below stated as follows: -

"The plaintiff's action in this instance is for a claim of damages for the loss that he suffered as a result of an electrical fire which destroyed his bakery and bakery equipment.

The exact details of what happened in this instance might perhaps never be known. This is perhaps on account of the fact that expertise in the field of investigating electrical fires is somewhat lacking."

8. Further, on page 3 of the judgment, the Court below said: -

"Having provided the plaintiff with power, there were no problems faced by the plaintiff. He proceeded to run his bakery, till the meter that had been initially installed developed a fault which necessitated that it should be replaced. According to the evidence there are suggestions that the replacement meter that was given to the plaintiff had a lower capacity than the requirements of the bakery. This, coupled to the fact that there were reports of sparks on the power lines supplying the plaintiff's bakery, is what apparently led to the fire. Of course such theories were disputed by an Engineer from ESCOM and the same seems to have also been conceded by the Engineer that the plaintiff called to testify. This was on account of the fact that if there had been a power surge, (which is what is being suggested), then all the shops on the plaintiff's line would have been affected. Thus the issue of what caused the fire was still debatable. It is in fact in this regard, that I earlier observed there is a gap in investigating electrical fires in this country.

Noting the lack of conclusive evidence in what caused the fire, I elected to call a witness from the Lilongwe City Council Fire Brigade, by the name of Robert A. Jiya, who is the Chief Fire Officer. Mr Jiya submitted a report of the fire to the court which did state that they did not establish what caused the fire..."

9. And on page 4 of the judgment, the Court stated as follows: -

"Was the fire as a result of negligence? I do not think so, for indeed if this was a case of negligence then my ruling would have been that it was commenced in the wrong division."

10. This is the statement which founds the appellant's second ground of appeal. The appellant argues that since it was clear to both parties that the main issue before the Court was whether the fire which erupted at the respondent's bakery was a result of negligence on the appellant's part, the Court below having found that there was no negligence ought to have dismissed the respondent's claim at that point.

11. We entirely agree with the appellant. Once the Court found that there was no negligence on the part of the appellant, that was the end of the respondent's case. On the pleadings before the Court, surely, it meant that

the respondent had failed to discharge his burden of proof. Consequently, the Court was bound to dismiss the action.

12. However, this was not the case. The Court below proceeded to invent an alternative cause of action for the respondent and proceeded to determine the action on the basis of it. And this is the basis of the appellant's first ground of appeal.

13. The Court below, on its own initiative, formulated a new cause of action in contract on behalf of the respondent. Regrettably, this cause of action was only revealed in its judgment. There is no indication in the record before this Court that the Judge brought this new cause of action to the attention of the parties and that he afforded them an opportunity to make representations. Clearly, the judge abdicated his role as an umpire. He descended into the arena and started throwing blows at the appellant, who, metaphorically speaking, had already knocked out the respondent. Obviously, the appellant was taken by surprise. He did not expect such conduct from the umpire who was supposed to be impartial. No wonder the appellant is aggrieved.

14. The appellant submits that the Court below entered the judgement for the respondent on the basis that it found the appellant in breach of warranty to supply goods, an issue which the respondent did not plead. The respondent on the other hand, argues that the issue was impliedly pleaded in its statement of case. The respondent further submits that the breach of warranty to supply a meter fit for the purpose need not have been specifically pleaded.

15. It is settled law that the purpose of pleadings is to identify the issues in dispute between the parties. And it is only those issues that can go for hearing. And it follows that a court is not entitled to adjudicate on any issues that the parties themselves have not raised in their pleadings. The cases of *Malawi Railways Limited v Nyasulu* [1998] MLR 195; *Nseula v Attorney General* [1999] MLR 312; *Saukila v National Insurance Co Ltd* [1999] MLR 362 and *Malawi Telecommunications Ltd v SR Nicholas Ltd* [2014] MLR 218 among others, still remain good law on this point.

16. In *Malawi Telecommunications Ltd v S R Nicholas Ltd* (supra) this Court reinforced the purpose of pleadings. It said at 226-227: -

> "Our system of civil litigation is already adversarial. The only meaningful means therefore for delineating and at the same time circumscribing the subject matter for determination is by way of pleadings without which litigation might be open ended and always

unfinished business. Pleadings limit the parties as well as the tribunal powers to venture into the unexpected and possibly the unknown."

17. In *Nseula v The Attorney General* (supra) emphasizing on the importance of pleadings, this Court quoted with approval a passage from an article by Sir Jack Jacob, "The Present Importance of Pleadings" in Current Legal Problems, Volume 13, Issue 1, 1960, page 171 at 174 in the following manner (at page 321):

> "As the parties are adversaries it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matter in dispute which the parties themselves have raised by their pleadings. Indeed the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of them might well feel aggrieved; for a decision given on a claim not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice." (Court's emphasis.)

18. Though spoken in 1960, these words still reverberate in our courts today for nothing has changed over the years. For as long as are pleadings are exchanged between opposing sides, the principles stated come into play. As numerous cases have demonstrated over the years, you can only ignore these principles at your own peril. One would have thought that in view of this Court's repeated pronouncement and emphasis on the importance of pleadings over the years, this should have been an obvious and straight forward matter. However, as the present appeal has demonstrated, it is imperative that we should unceasingly remind one another of the critical role that pleadings play in civil litigation.

19. The present appeal invokes to one's mind the words of Scrutton LJ in *Blay v Pollard & Morris* [1930] 1 KBD 628, where he makes the same point when he says at 634:

"Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."

20. We are of the same opinion in this appeal.

21. The issue on which the judgment was entered in favour of the respondent was not on record. It was not raised by either party. It was raised by the judge himself albeit without amendment of the pleadings. Thus, the parties were not put to notice. They were ambushed. Surely, they must have been surprised to hear the basis of the judgment. As was stated in the *Nseula* case, this is equivalent to not hearing the parties, especially the appellant, who was condemned by the judgment. Undoubtedly, the appellant was denied justice.

22. We wish to emphasize this point and thereby run the risk of sounding repetitive or being pedantic. It is important that we must always remember that in civil litigation, cases must be decided on the basis of the pleadings before the court. See *In The Matter of Citizen Insurance Co Ltd v In The Matter of The Registrar of Financial Institutions* [2014] MLR 131. Our experience in handling criminal matters should not cloud our approach to civil litigation. It must be remembered that the principle in section 150 of the Criminal Procedure and Evidence Code which allows a court to convict a person of an offence not charged but disclosed by the facts as proven, should never be brought into civil litigation. It does not apply in civil litigation. It should be restricted to criminal matters.

23. Thus, when a party has failed to prove its case as pleaded, even though the facts as proven disclose a different cause of action, the judge should never substitute the original cause of action with the one disclosed by the facts as proven. It is only a party to the action who can do that through amendment of the pleadings.

24. In *Banja La Mtsogolo v Harriet Chiomba* [2009] MLR 18 this Court emphasized that the court's duty to remain impartial and neutral should never be dwarfed by the its Constitutional duty to give effective remedy to a litigant. And that the latter duty does not extend to amending pleadings on behalf of a party, that is, actually doing the job of counsel and/or litigants in proceedings. The Court stated at pages 22-23: -

"It must be appreciated that there is usually tension between the Court's zeal to give a litigant effective remedy and the Court's

overarching duty to remain impartial and neutral during legal proceedings. We think that care must be taken that the duty to provide effective legal remedy must not dwarf and undermine the duty to remain impartial. Nothing can be closer to partiality than taking over from Counsel the duty to amend pleadings and discharging that duty on behalf of Counsel for the benefit of his client. We are unable to believe that granting an effective remedy is to give a litigant a remedy which has not been requested. The requests of litigants are contained in their pleadings."

25. We believe that had the Judge in the court below taken heed of this valuable counsel, he would not have found himself in this situation where his zeal to give the respondent an effective remedy clearly overshadowed his overarching duty to remain impartial and neutral. Had he allowed himself to be guided by the pleadings before him, he would not have committed the error that necessitated this appeal.

26. The counsel in the *Nseula* case (supra) should never be forgotten and warrants enduring recognition. As a mark of emphasis, we shall, again, quote from the judgment. At page 322 this Court said: -

> "In our judicial system, it is the parties themselves who set out the issues for determination by the court through their pleadings and both of them must strictly adhere to the pleadings. In the present case, although the Judge stated that he had invited Counsel to address him on the effect of the provision of section 88(3) of the Constitution, the matter was not raised on the pleadings by either party. In our view it was perfectly open to him to express his opinion by way of obiter, on what he felt was the effect of the provision of section 88(3) of the Constitution. It was therefore wrong for the Judge to decide on a matter which had not been raised by the parties on their pleadings and he should not have made it the definitive basis of his decision."

27. Once the Judge in the court below found that the respondent had failed to prove his case in negligence as pleaded, he should have proceeded to dismiss the action. There was no basis for the Judge to continue and find that the appellant had breached an implied warranty to supply goods of merchantable quality, since this was not pleaded in the statement of claim and was not up for determination. The respondent did not plead breach of contract. The issue that the appellant had installed a used meter was pleaded to prove the alleged negligence and not a breach of warranty

under a contract. The appellant could only have been held liable for breach of contract had the respondent pleaded it. On his own, the Judge tried to aid the respondent by transitioning the claim for negligence to one for breach of contractual warranty. This was erroneous as he was not entitled to do so and there was no basis for doing it.

28. Whatever he went on to say about the commercial nature of the relationship between the parties and the breach of the warranty to supply goods of merchantable quality should have been said by way of obiter if he was so minded to vent it out. It should not have formed the basis of his decision. Therefore, it was wrong for the Judge to decide the case on an issue which had not been raised by the parties in their pleadings before him. See *Citizen Insurance Company v Kharafy and Sons* [2014] MLR 83.

29. In an attempt to salvage the situation, the respondent submitted before us that the issue of breach of warranty to supply goods of merchantable quality was brought to the attention of the court below during trial and that the appellant did not object to it as such the Judge was entitled to proceed as he did. We must say that there is no substance in this argument. We would quote Sir Jack Jacob (supra) where he states: -

> "In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specified may be raised without notice."

30. So, for as long as the issue was not pleaded by the parties, it could not make it to the agenda for the trial. If indeed the issue of breach of warranty was brought to the attention of the Judge (though the respondent did not refer the Court to any part of the record of appeal to substantiate this) it was erroneous for the Judge to entertain it in the absence of an amendment to the pleadings. It was irrelevant and a waste of the court's time. And we would commend the appellant for deciding to stick to the agenda as defined by the pleadings and keeping quiet in the circumstances.

31. We are certain that the Judge was wrong in giving judgment predicated on breach of warranty, a claim which was not pleaded or raised by the respondent in his statement of claim.

32. In the circumstances, we find that the grounds of appeal are meritorious. Therefore, we allow the appeal and it succeeds in its entirety. The judgment of the court below is hereby set aside.

33. The money paid into court by the appellant pursuant to the judgment we have set aside must be paid back to the appellant within 21 (twenty-one) days from the date hereof.

34. On the issue of costs, we note that the appellant was represented by two counsel in this Court. We do not think that the issues raised in this appeal are complex enough to warrant the instruction of more than one counsel. The issues are straight forward as they involve a principle of law which is well settled. Therefore, we award the appellant costs in this Court and in the court below for one counsel only.

Kamanga SC, JA

35. I have read the judgment delivered by Katsala, JA herein and I concur.

Kalembera SC, JA

36. I had the privilege of reading in draft the judgment delivered by Katsala, JA. I concur with the conclusions and reasoning therein.

Madise SC, JA

37. I read in draft the judgment delivered in this appeal by Katsala, JA. I too wholly agree with the conclusions and reasoning therein.

Mbvundula SC, JA

38. I had an opportunity to read in draft the judgment delivered in this appeal by Katsala, JA. I concur.

D Kamanga SC, JA

39. I had the privilege to peruse in draft the judgment delivered herein by Katsala, JA and I concur.

Pronounced in open court at Lilongwe this 18th day of July 2024.

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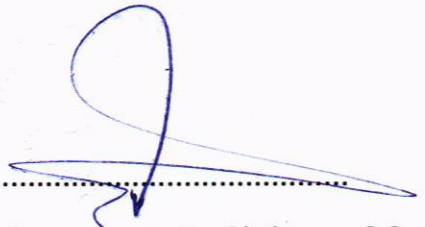
Hon Chief Justice R.R. Mzikamanda SC.



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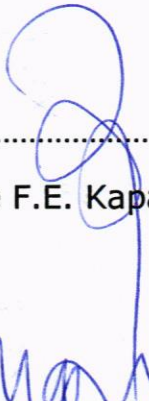
Hon Deputy Chief Justice L.P. Chikopa SC.



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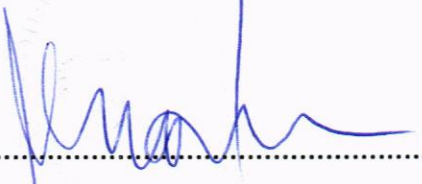
Hon Justice F.E. Kapanda SC., JA



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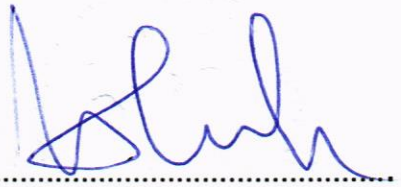

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Hon Justice J. Katsala SC., JA.

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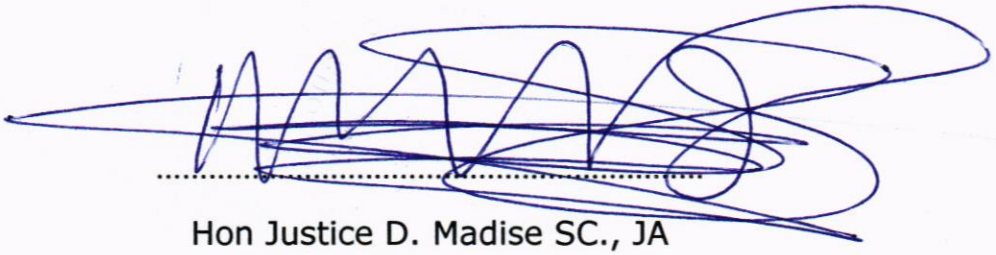

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Hon Justice D. Madise SC., JA

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Hon Justice D. Kamanga SC., JA