REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NO 418 OF 2019

BETWEEN:

FMS LIMITED — CLAIMANT

-and-

KANENGO TOBACCO PROCESSORS LIMITED — DEFENDANT

CORAM: HON. JUSTICE J. ALIDE

Mrs. P. Chuma, of Counsel for the Claimant

Mrs. F. Mitambo, of Counsel for the Defendant

Mr. B. Ntonya, Court Clerk

Ruling

1. The defendant brought this application under Order 10 of the Courts (High Court) (Civil Procedure Rules) 2017 and the Court's inherent jurisdiction. The application seeks an order of this court striking out the summons, and to have the present matter dismissed on the ground that it is *res judicata* and an abuse of the process of the court.

2. The factual background of the matter is that the claimant and the defendant are both duly registered private limited companies incorporated in Malawi and engaged in the business of customs clearing and tobacco processing respectively.

3. In compliance with the tax laws in Malawi, the companies were registered for tax purposes by the Malawi Revenue Authority (MRA), incidentally, on the same date, 9th October 2009. The claimant was assigned Tax Payer's Identification Number (TPIN) 20187606, while the defendant was assigned TPIN 20187218.

4. In or about December 2009, MRA issued the defendant with a certificate for Value Added Tax (VAT) registration erroneously reflecting the claimant's TPIN 201887606.

5. The claimant claims that this error resulted in the defendant repeatedly using the claimant's TPIN for all its transactions between December 2009 and December 2017. This was regardless of the claimant having advised the defendant against such use.

6. The claimant contends that as a result of the defendant's continuous wrongful use of the claimant's TPIN, the claimant was assessed for tax based on very high figures. The high figures were due to voluminous tax filings by the defendant which were wrongly reflected on the claimant's TPIN. As a result, the claimant failed to pay the assessed tax as it could not afford so to do. The issues surrounding these events were apparently brought to the attention of MRA. However the matter remain unresolved, and the defendant has not traded since 2013.

7. The claimant brought the current action against the defendant seeking redress on account that all these issues emanated from the defendant's wrongful use of the claimant's TPIN. The claimant is, therefore, claiming damages against the defendant for negligent use of the claimants Tax Payers' Identification Number (TPIN); loss of business; and violation of the claimant's right to property in the TPIN. The claimant also claims costs of the action.

8. On the other hand, the defendant denies the claim and states that since registering as a taxpayer, it has consistently used its originally assigned TPIN 20187128 for all its tax returns. It claims that it has never used the claimant's TPIN as claimed or otherwise. It further pleaded that in any case the current matter is *res judicata*, having been determined by the same court, and therefore an abuse of the process of the court.

9. The application has been supported by a sworn statement and skeletal arguments. Oral submissions were also made accordingly.

10. It is the defendant's submission that the present action is *res judicata* as the claimant had previously brought the same against the Malawi Revenue Authority and the defendant in the High Court of Malawi, Revenue Division, as Revenue Cause number 14 of 2017. In those proceedings, the court ordered the removal of the defendant as a party because the claimant did not show any cause of action against it.

11. It was submitted that the present action is basically an attempt by the claimant to re-litigate the matter. It seeks to overturn the ruling of the Revenue Division through the back door, without an appeal, as normally required.

12. The defendant further noted that the present action was also raising other matters which could have been litigated in the earlier proceedings, but for some reason, were not brought then.

13. Counsel further argued that it is an established principle that parties to litigation are obliged to advance their whole case at once and should not bring the same in bits and pieces. It was submitted that, overall, this was collateral attack on the ruling of the Justice Chigona in the previous matter. Ultimately, the defendant called upon the Court to dismiss the matter as it was *res judicata* and an abuse of the process of the court.

14. On the other hand, the claimant filed a sworn statement and skeleton arguments in opposition to the application. Oral submissions were also made in respect of the same.

15. The claimant argues that the present proceedings do not fall within the test required for a matter to be declared *res judicata*. It was submitted that the court's ruling in the previous proceedings did not litigate whether the claimant had a cause of action against the defendant, or not, based on the defendant's conduct, mainly on the alleged negligence in the use or misuse of the claimant's TPIN. It was submitted that the previous proceedings hinged on the refusal by the Malawi Revenue Authority to issue a Tax Clearance Certificate to the claimant. It has been submitted that the statement of claim that was filed in the matter did not detail any claim of negligence against the defendant but simply dwelt on the issue of denial of issuance of the Tax Clearance Certificate.

16. Counsel further argued that the full facts of the defendant's conduct were never interrogated by the court and therefore the case of the defendant's alleged negligence in the use of the claimant's TPIN was not before the court. It was submitted that the court determined the matter based on the failure by MRA to hear the claimant's appeal in the claimant's efforts to get a Tax Clearance Certificate. Therefore it is the claimant's view that its right to seek redress against the defendant's negligent conduct was still alive.

17. In conclusion, the claimant opposes the application and submitted that the matter cannot be *res judicata*, and cannot an abuse of the court's process.

18. The issue before the court now is to determine whether the matter filed by the claimant herein is *res judicata* and an abuse of the process of the court.

19. *Res Judicata* may in simple terms be referred to as a principle of law that stops a matter that has previously been brought before a court of law and adjudicated upon to be re-opened and pursued by the same parties in another court of law.

20. In **Finance Bank of Malawi (In Voluntary Liquidation) vs Lorgat and Others**, Commercial Case No. 56 of 2007, Justice Dr. Mtambo defined *res judicata* as follows:

> *"Res judicata is a special form of estoppel. The rule is to the effect that parties to a judicial decision should not afterwards be allowed to re-*

litigate the same question. As between themselves the parties are bound by the decision even though it may be wrong and the only way out by an aggrieved party is to appeal. Apart from being barred from re-litigating the same cause of action, the parties are precluded from re-opening any issue which was an essential part of the decision."

21. And in a slightly later decision in **Urban Mkandawire v Council of the University of Malawi** [2008] MLR 404. It was held in this case that:

"Res judicata is a rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action....res judicata bars re-litigating the same cause of action between the same parties where there is a prior judgement."

22. In essence, *res judicata* is a form of estoppel. It stops parties to a judicial decision to proceed and re-litigate or open up the very same question that had been previously decided by the court. The estoppel is premised on two types: cause of action estoppel and issue estoppel.

23. A cause of action estoppel arises where proceedings involving the certain parties or their representatives are identical to prior proceedings involving the same parties and the same subject matter. On the other hand an issue estoppel arises where a particular issue hinging on a particular matter has been litigated and decided between certain parties. However, in the following different proceedings involving the same parties, in which the previous issue is relevant, one of the parties attempts to re-open the issue.

24. His Lordships, in the Supreme Court of Appeal in **The Malawi Revenue Authority vs Azam Transways** [2008] MLR 382, threw light on the same on page 388 as follows:

"We remind ourselves that, broadly speaking, the plea of res judicata is about two types of estoppels, namely, cause of action estoppel and issue

estoppel. Cause of action estoppel is confined to where the cause action and the parties in a proceeding are the same as before. Issue estoppel, on the other hand, arises in two instances:

(a) Where issues, whether factual or legal, have already been determined in previous proceedings between the parties - this is sometimes described as "issue estoppel in strict sense"; or

(b) Where the issues, whether factual or legal, should have been litigated in previous proceedings but were not brought before the court - this is what is referred to as the "Henderson rule".

25. In **Arnold v National Westminster Bank** plc [1991] 2 AC 93, the Court considered in clear detail the classic difference between cause of action estoppel and issue estoppel. It was stated that:

> *"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgement. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.*
>
> *Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."*

26. The above position was also echoed by Justice Dr. Mtambo in the **Finance Bank Limited (In Voluntary Liquidation) v Ishmael Lorgat and others** case above. On page 7 he stated as follows:

"Issue estoppel must be contrasted with cause of action estoppel. A cause of action can be defined as a set of facts on the basis of which a claim is proffered. Therefore, where a set of facts is available but a plaintiff does not invoke all the set of facts in an action, that party will be estopped from bringing a second action against the same party based on some of the set of facts available in the prior action but not utilized."

27. In respect of the issues estoppel, **Malawi Communication Regulatory Authority v Joy Radio Limited** [2011] MLR 256 which quoted **Senner No.2** 1 WLR 490. On page 499 Lord Brandon opined that:

"in order to create an issue of estoppel, three requirements have to be satisfied. The first requirement is that the judgement in the earlier action relied as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive, and (c) on merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue is the same issue as that decided by the judgement in the earlier action."

28. Abuse of process of court is a principle that remains fluid as the courts have not attempted to define the same or to categorize fully which actions can be termed as such. All the courts have done is to rely on various decisions that have been delivered which isolates various issues and termed them as such.

29. The Supreme Court of Appeal in **The Malawi Revenue Authority vs Azam Transways** case above put the same very well on page 388 when it said:

*"The circumstances in which abuse of process can arise are very varied. Reference need not be made to all of them, but, as Lord Somervell put in **Greenhalgh v Mallard** [1947] 2 All ER 255, may cover "issues or facts which are so clearly part of the subject matter of the litigation and so*

clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."

30. It is therefore an abuse of the process of the court for a party to re-litigate an issue after the same issue has been tried and decided by the court. See **House of Spring Gardens Ltd v Waite** [1991] 1 Q.B. 241; [1990] All ER 990 CA.

31. It is an abuse of the process of the court to raise in subsequent proceedings matters which should have been or could have been litigated in earlier proceedings. See **Ashmore v British Coal Corp** [1990] 2 All ER 981 and **Yat Tung Investment Co. Ltd. V Dao Heng Bank Ltd.** [1975] 1 MLR 1394, [1989 1 All ER 129, CA.

32. All the above propositions are coming from the background that parties to litigation must advance their whole case at one time and should be prevented from repeatedly, piecemeal, going back to court to advance matters which might have been raised in earlier proceedings piecemeal. See **Barrow v Bankside** 1996 1W.L.R. 257.

33. Piecemeal litigation must be abhorred at all times as there must be an end to litigation.

34. This position was firmly stated by Nyirenda, J, as then he was, in **Nthara v ADMARC** [1995] 1 MLR 180 where he said:

"The point made here is simply that it should not be competent on the part of a litigant who is aware that he has a good case to torment the other party to the case by bringing against him piecemeal actions. There must be an end to litigation and this is why courts might even go beyond the res judicate estoppel and stop litigants in any subsequent proceedings from raising issues which were open to them in earlier proceedings."

35. In **Henderson v Henderson** (1843) 3 Hare 100, [1843] EngR 917 the court set down the principles to be applied in abuse of court process cases where a matter,

which should have been dealt with in an earlier proceeding, has been raised again in the proceedings. Sir James Wigram VC said;

> *"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which was not brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

36. This court has considered the current application including the sworn statements and skeleton arguments that have been filed by the defendant and the claimant in support and in opposition to the application respectively. The court has considered oral arguments in support of the parties' respective positions.

37. The claimant brought the present matter against the defendant claiming damages for negligent use of the claimants Tax Payers' Identification Number (TPIN); loss of business; violation of the claimant's right to property in the TPIN. The claimant further claimed costs of the action.

38. It is not in dispute that three years prior to this action, the claimant brought up an action against the Malawi Revenue Authority, as the first defendant, and the defendant herein as the second defendant, in the High Court of Malawi, Revenue Division under Revenue Case No. 14 of 2017 claiming several declaratory orders.

39. Among other things the claimant claimed that the MRA and the defendant had "jointly and severally colluded to commit fraudulent tax offenses thereby depriving the claimant of any economic activity contemplated under the Malawi Government Constitution". In that matter, the claimant asked the court to issue several declaratory orders as follows:

a) *An order for restoration into business;*
b) *A declaration that the claimant is the owner of TPIN 20187606;*
c) *Reversal of any entries which consequently benefitted the defendants;*
d) *Erasing any debts or further debts entered against the claimants;*
e) *A declaration that the 2nd defendant claim for refund was a nullity and the entry by the first defendant was fraudulent, or a misrepresentation and a consequence of collusion;*
f) *A declaration that the claimant lost business;*
g) *A declaration that the claimant is entitled to damages;*
h) *Interest on the damages at commercial banking rate;*
i) *Legal costs as prescribed on the money collectable being 15% of the sum due and payable; and any other order the court may deem just, fair and equitable in the circumstances.*

40. It is very clear from the summons and the declaratory orders sought that the earlier action against the MRA and the defendant hinged on the premise that the MRA and/or the defendant had used the claimants TPIN fraudulently and/or improperly, or through misrepresentation.

41. During these prior proceedings, the defendant applied to be removed as a party under Order 6(8) and Order 10 of the Courts (High Court) (Civil Procedure) Rules, 2017 on the ground that the claimant had failed to show any cause of action against the defendant.

42. My brother judge, Justice Chigona, heard the application and issued an order removing the defendant as a party from the proceedings. The claimant did not appeal against the said decision.

43. Two years down the line, the claimant is back in court with these, current, proceedings.

44. The main argument advanced by counsel for the claimant in opposition to the current application is that Justice Chigona's ruling removing the defendant from the previous proceedings was not delivered on the merits as it did not interrogate the rights of the claimants against the defendants on the full facts of the case.

45. Counsel also argued that the court's previous decision was not premised on the same issues that had been raised in the present matter.

46. Counsel heavily relied on **Malawi Communication Regulatory Authority v Joy Radio Limited** which quoted **Senner No.2** as referred above.

47. It was the claimant's submission that the matter cannot be deemed *res judicata* because the previous decision was neither based on the same issues as in the previous case nor on its merits. Accordingly, it was argued, the present matter cannot be *res judicata* or an abuse of the court process.

48. We disagree with counsel's submission. The decision by Justice Chigona removing the defendant as a party in the previous proceeding was final in as far as those proceedings against the defendant were concerned.

49. The court decided that there was no cause of action against the defendant meaning there was no need for the court to further proceed and interrogate any issue in the said matter. By declaring that there was no cause of action, the court ultimately pronounced where each party stood in the matter in as far as their rights were concerned, namely that the claimant had not shown any cause of action against the claimant necessitating the bringing up of any proceedings against the defendant. The claimant had the right to appeal against the decision.

50. Further, looking at the statement of case and the reliefs sought in the present action, it is very clear that the matter hinges on the very same issue which led to the claimant commencing proceedings in the earlier matter i.e. alleged fraudulent or negligent use of the claimant's TPIN.

51. The reliefs sought in the previous claim and the current claim are nothing but all the same.

52. There has, of course, been an attempt to gloss the current matter with different language and a few other new things in an attempt to make the same as different from the previous one. It is clear however, very clear that present, and the previous matter, are all but one side of the same coin.

53. The present claim is caught in the words of Justice Dr. Mtambo in the **Finance Bank Limited (In Voluntary Liquidation) v Ishmael Lorgat and others** case where on page 7 thereof he stated as follows:

> *"A cause of action can be defined as a set of facts on the basis of which a claim is proffered. Therefore, where a set of facts is available but a plaintiff does not invoke all the set of facts in an action, that party will be estopped from bringing a second action against the same party based on some of the set of facts available in the prior action but not utilized."*

54. It is our finding that the current matter hinges on the very same facts and issues as was raised in the previous matter. The few new introductions were thrown in for the claimant to create a cause of action against the defendant. This does not help that cause because cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or no - existence of cause of action in the earlier proceedings.

55. In this action, cause of action estoppel bars the claimant from raising of new points, essential to the existence of a cause of action but which were not considered because they were not raised in the earlier proceedings. See **Arnold v Westminster Bank plc** case above.

56. With the above in mind, it is also our finding that there is indeed a clear attempt by the claimant to re-litigate the matters that came before the court, using different language and approach. This has been by way of trying to patch up the omissions, in the earlier matter, which could have been brought up in those prior proceedings. This amounts to an abuse of the process of the court as per **House**

of Spring Gardens Ltd v Waite and **Ashmore v British Coal Corp.** and **Yat Tung Investment Co. Ltd. V Dao Heng Bank Ltd.**

57. It is further our finding that the claimant did not advance his full case in the previous matter. That is why the claimant is now caught in the present circumstances where it is trying to patch up its case here and there.

58. It is all but settled that parties to litigation must advance their whole case at once and should be prevented from repeatedly going back to court to advance matters which should have been raised in earlier proceedings, piecemeal. See **Barrow v Bankside.**

59. As already noted, piecemeal litigation must be abhorred at all time, and there must be an end to litigation. See **Nthara v ADMARC** above.

60. The rationale is that courts should not be used as a conduit to persecute litigants but must ensure that issues are brought and litigated once and for all.

61. Finally let me observe that this court takes notice that the earlier matter in which the claimant sued MRA and the defendant, is yet to be concluded.

62. The two matters are intertwined and the reliefs sought are more or less the same as noted. What if the matter against MRA and this matter come up with contradictory judgements bearing in mind that they are both hinging on the same premise i.e. the alleged fraudulent or negligent or misuse of the claimant's TPIN? The long and the short of it is that the present matter has potential to make mockery of our judicial system. This is not what this court is here for.

63. It is nothing but our conclusion that the claimant is all but trying his luck on two fronts. He is on a fishing expedition. The court should therefore not entertain the same.

64. For the reasons highlighted in the foregoing, it is our finding, therefore, that the present matter is *res judicata* and an abuse of the process of the court.

65. This application therefore succeeds in its entirety.

66. Accordingly, the summons are hereby struck off with costs to the defendant.

Dated this 12th day of February 2021.

Jabbar Alide

JUDGE