



**REPUBLIC OF MALAWI**

**IN THE HIGH COURT OF MALAWI**

**FAMILY AND PROBATE DIVISION PRINCIPAL REGISTRY**

**CIVIL CAUSE NUMBER 291 OF 2024**

**Between:**

**RONALD AMOS.....1<sup>ST</sup> CLAIMANT**

**ELIZABETH AMOS.....2<sup>ND</sup> CLAIMANT**

**AND**

**ALICE AMOS PHIRI.....DEFENDANT**

**CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA**

Counsel Kunitengo of Counsel for the Claimants

Counsel Maliwa of Counsel for the Defendants

Ms. Christina Kazembe Court Clerk and Official Interpreter

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**RULING ON JURISDICTION**

**Kayira J**

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**INTRODUCTION**

The Claimants obtained a prohibitory injunction against the Defendant on 20<sup>th</sup> August, 2024. The claim by the Claimant is that they were in a partnership relationship with the Defendant. As a partnership, the Defendants had an entitlement over 40% whilst each one of the Claimants had 30% entitlement. Through the proceeds of the family business, the parties managed to procure properties which included houses in Chiradzulu and Namiyango. All the rentals collected from the properties of the family business were deposited into the family bank account. As partners, they were all along sharing the proceeds of the business according to the percentages of their entitlements. However, without any basis and to the surprise of the other family members, the Defendant instructed the tenants in the houses to be depositing

renters from the family properties into her personal bank account. The Claimants tried to reason with the Defendant to stop her from denying the proceeds of the family business but the Defendant did not cooperate. The Defendant is now claiming ownership of the family business and the properties that re in Chiradzulu and Namiyango and she is requiring all the tenants to adhere to her instructions such that all the tenants in the houses are refusing to comply with instructions from the Claimant being part of the family. The Claimants are claiming their shares of the proceeds from the family properties to support their lives since they have all along been relying on the family business whose income was invested in the properties. The conduct of the Defendant has greatly and adversely affected the Claimant in their survival of everyday life.

The Claimant prayed for the following reliefs;

1. a permanent order of the Court restraining the Defendant from taking over all the family properties realise from the family business to the total exclusion of the Claimants;
2. an order of Genoa and exemplary damages for all inconveniences caused to the climate due to the conduct of the Defendant and other leaders
3. any other order as the Court deems fair and just to both parties in the circumstances and
4. cost of the action.

After filing the claim, Claimants served on the Defendant who filed a defence on 3<sup>rd</sup> October 2020. On 16<sup>th</sup> October 2024 the Claimant filed an application for a default judgement under order 12 rule 6 Courts (High Court) (Civil Procedure) Rules of 2017-CPR. This Court heard that the application had been overtaken by events since the defence had already been filed. On a set October 2020 form the Defendants threw their Counsel filed an application filed an application for an order to discharge the interlocutor injunction under order 10 rule 27 of the CPR. The said the application was supported by the sworn statement of the Defendant and skeleton arguments. This application was said for hearing on 17<sup>th</sup> December, 2024.

Since the Claimants obtained a prohibitory injunction against the Defendant on 20<sup>th</sup> August, 2024, they filed an application for contempt of Court proceedings under Order 3 rule 5 of the CPR. This application was set for hearing on 10<sup>th</sup> December, 2024. On 10<sup>th</sup> of December, 2024, this Court heard the application from the Claimants against the Defendant and the Court ordered that the Defendant should pay all the dues into Court in line with the interlocutory injunction. The matter was then adjourned to 17<sup>th</sup> December, 2024 and that in the event that the Defendant does not comply with the order, then a warrant of arrest was to be issued against her and the further applications by the Claimant were adjourned to 17<sup>th</sup>

December 2024.

On 16<sup>th</sup> December 2024, The Defendant filed an application for an order vacating or staying the operation of the order of injunction pending the determination of the matter under order 10 rule 1 of the CPR and section 55 of the Courts Act read together with his section 11 (b) of the same Courts Act & the inherent jurisdiction of the Court. In that application the Defendant sought an order that this matter should be transferred to an appropriate Division of the High Court being either the commercial Division or the civil Division as the Court may determine suspend operation of its order made on 10<sup>th</sup> December, 2024 in the absence of the Defendant pending the making and the determination of an application by the Defendant to rehear contempt of Court proceedings or in the alternative set aside they said order out rightly and order a fresh hearing of contempt of Court proceedings varying the order of injunction to the extent of preserving the rentals collected and striking out the Claimant's case for failure to disclose a reasonable cause of action. This application was supported by a sworn statement of the Defendant and skeleton arguments. The application was set for hearing on 17<sup>th</sup> December, 2024 together with the applications of the Claimants.

When the Court sat on 17<sup>th</sup> December, 2024, the parties were heard, and this Court Set and signed the order committing the Defendant to civil prison and ordered that the total sum of 13,300,000 a quarter should be paid by the Defendant before close of business on 18<sup>th</sup> December 2024 but the parties should file all necessary documents for mediation purposes before 10<sup>th</sup> January 2025. In short, the parties were given up to the 1<sup>st</sup> of January, 2025 to file all the necessary documents for purposes of mediation before either Justice Mambulasa or if his diary could not accommodate the closest date, then Justice Chigona can do the mediation. The two applications namely application for amendment of statement of case and application on determining cause of action where adjourned to a date that was to be set after the parties file all the necessary documents.

On 19<sup>th</sup> December 2020 the Defendant filed an application for an order vacating or staying the operation of the order of injunction pending the determination of the matter under order 10 rule 1 of the CPR and section 55 of the Courts Act read together with his section 11 (b) of the same Courts Act this application is supported by a strong statement of the Defendant and the skeleton arguments which we have filed by the Defendant. This Court directed that the application should come interparties and the Defendant complied with the Court order and the application was set for hearing on 30<sup>th</sup> December 2024. On 7<sup>th</sup> January 2025 the Claimant filed an application for an order that the money which was paid into Court by

the Defendant should be paid out to their Claimants under Order 10 of the CPR and the Court inherent jurisdiction this application was supported by some statement of Counsel Kunitengo and the skeleton argument. On 28<sup>th</sup> January 2025 they Claimant filed an application for an order that the money which was paid by the Defendant in two Court should be paid out of Court and order 10 of the CPR and the Court's inherent jurisdiction. This application was opposed by the Defendant who filed their process on 17<sup>th</sup> February, 2025.

On 11<sup>th</sup> January, 2025 the Defendant filed an application to strike out the action over the Claimant for disclosing no reasonable cause of action and for want of jurisdiction on the part of the Court in the alternative for an order vacating or staying the operation of the order of injunction pending the determination of the matter under order one order 10 rule 1 of the CPR and section 55 of the Courts Act read together with his section 11 (b) of the same Courts Act this application is supported by a sworn statement of the Defendant and the skeleton arguments which we have filed by the Defendant. On 28<sup>th</sup> January, 2025, the Claimant filed an application for an order that the money which was paid by the Defendant into Court should be paid out of Court do they Claimants this application was made under order 10 of the CPR and the inherent jurisdiction of this Court. The application was supported by a sworn statement of Counsel Kunitengo and the skeleton arguments. This Court resumed on 18<sup>th</sup> February 2025 to hear all the pending applications in this matter.

The Court heard the application by the Defendant to strike out the present application for lack of jurisdiction and for lack of disclosing reasonable cause of action the parties address this Court at length the path is addressed is called at length and their arguments will be taken into account in the analysis.

## **REASONED ANALYSIS OF THE COURT**

### **JURISDICTION**

The first issue for determination before this Court relates to jurisdiction. This is the authority of a Court (or an official organization) to make decisions and judgment<sup>1</sup>. It also refers to the power, right or authority to interpret and apply the law<sup>2</sup>. Jurisdiction is the term that refers to the limits of a legal authority. It can refer to both political territories and geographic regions, as well as the types of legal matters over which a legal body has authority...When a legal body holds jurisdiction, it has the authority to administer justice

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<sup>1</sup>The Cambridge Dictionary (<https://dictionary.cambridge.org/dictionary/english/jurisdiction>).

<sup>2</sup>Merriam Webster Dictionary (<https://www.merriam-webster.com/dictionary/jurisdiction>)

within that jurisdiction<sup>3</sup>. In Malawi, issues of jurisdiction have been properly provided for in the Constitution.

## **UNLIMITED ORIGINAL JURISDICTION**

In his submissions, the Defendant argued that this Court has no jurisdiction over the present matter because it relates to commercial issues and has no element of family and probate. On the contrary the Claimant argued that this Court has unlimited original jurisdiction under the constitution which means that it can handle any matter regardless of the subject matter and value involved. Under section 108 of the Constitution, this Court has unlimited original jurisdiction over civil and criminal issues. The said provision states as follows:

“(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. (2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

Although the inherent, unlimited, original jurisdiction in terms of handling civil and criminal matters applies to the entire High Court, it has to be made clear that Section 6 of the Courts Act was recently amended to establish specialized Divisions of the High Court. This provision creates six (6) Divisions of the High Court. According to Section 6A of the Courts (Amendment) Act of 2022, at the High Court, the issues in dispute will only be pursued according to Divisions which include; Civil Division for any dispute between persons (natural/legal); Criminal Division for offences against the Republic; Commercial Division for commercial matters; Family and Probate Division for issues that related to family and deceased estate; Revenue Division for tax disputes; and Financial Crimes Court for offences and disputes relating to financial transactions affecting the economy of the country.

By virtue of creating these Divisions of the High Court value has created specialisation in terms of the High Court and handling of matters is premised on a that basis. The creation of these Divisions does not necessarily mean that the High Court has been stripped off over the unlimited original jurisdiction which the constitution which is under the constitution. However, continued handling of matters by the Divisions

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<sup>3</sup>The Legal Dictionary ([Jurisdiction - Definition, Examples, Cases, Processes \(legaldictionary.net\)](https://legaldictionary.net))

without regard to their specialty will defeat the very purpose of creating specialised Divisions. Section 6A(d) of the Courts Act specifically creates the Family and Probate Division of the High Court with a mandate to hear any family or probate matter. The definition of a “family matter” is provided in Section 2 of the Courts (Amendment) Act which states that a family matter is “*a civil matter which concerns the entry, subsistence and exit from a marriage, and incidental matters thereto*”. It is striking to note that in the statement of case particularly paragraph 8, the Claimant stated that there had been no divorce proceedings or any quarrels or disagreements concerning matrimonial properties between the Claimant and the deceased before her death. This Court believes that this statement was not meant to be part of the claim by the Claimant. It is an erroneous statement which misled this Court to believe that this case falls within its power and jurisdiction because it referred to divorce as well as death which is squarely within the jurisdiction of the Family and Probate Division of the High Court.

It is clear from the statement of claim excluding the above paragraph that the deponent is referring to a partnership agreement involving the parties herein and that such partnership agreement is what they are using as a basis for their claim. The specific focus is on the proceeds from the business centre. Counsel for the claimants submitted that this Court has unlimited original jurisdiction over civil and criminal matters such that it can handle any matter. Counsel cited the case of the **Republic versus Kasambara** where the High Court Commercial Division sat in a criminal matter and there was no issue with that kind of an arrangement. This Court notes that the case being referred to by Counsel for the Claimants is unique in its own way. The peculiarity of that case is different to the present case where the matter was filed by the Claimant in the Family and Probate Division instead of the Commercial Division of the High Court due to the subject matter of partnership and the value involved.

As rightly noted by counsel for the Defendant, issues of partnership are not within the definition of a mandate of the family and private Division of the high Court. they fall into the commercial Division of the High Courts the transactions between the parties are relating to commercial activities. This being the case, this Court has no jurisdiction to hear and determine the present matter. This lack of jurisdiction is from the beginning of the case. Therefore, all the orders that were made by this Court are *void ab initio*. Considering the issues under contention, this Court transfers this matter to the High Court Commercial Division principal registry which has a mandate under section 6A of the Courts Act. By virtue of this holding, the applications that are pending before this Court will be handled by the Judge in that Division.

## **COSTS**

The Defendants prayed for costs because the expenses incurred are due to non-compliance on the part of the Claimants. This Court is fully aware that costs are within its discretion under Order 2 rule 3 (e) of the CPR. This Court exercises its discretion and orders that the Claimants pay costs of the present application because had they followed the right procedure, there would not have been this expense. The costs must be paid within 45 days from today. If the parties do not agree, then the Registrar for Family and Probate Division should assess the costs within 90 days from the expiry of the 45 days.

It is so ordered.

**PRONOUNCED IN CHAMBERS ON 4<sup>th</sup> March, 2025 @10:30AM.**

A handwritten signature in dark ink, appearing to be 'JRK', is written over a faint, circular official stamp.

**HONORABLE JEAN ROSEMARY KAYIRA**

**JUDGE**