

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 92 OF 2001**

BETWEEN:

HARRISON KAJAWO

(through his father and next friend

Fred H. Kajawo).....PLAINTIFF

and

MALAWI NATIONAL EXAMINATIONS BOARD.....DEFENDANT

CORAM: HON. JUSTICE A.C. CHIPETA

Mr Kauka, of Counsel for the Plaintiff

Defendant/Counsel - Absent

Mr Khondiwa, Official Interpreter

RULING

The matter herein commenced on 4th July, 2001 with issue of an Originating Summons under Order 7 rule 2 of the Rules of Supreme Court. The said O.7 rule 2 of Rules of Supreme Court provides for two types of inter partes Originating Summons. The first is the Originating Summons in Form No. 8 of Appendix A which does not provide for a fixed return date while the other one is in Form No. 10 of the same Appendix which normally provides for a return date. I take it that the plaintiff in this case settled for the Form 10 type of Originating Summons, which is an expedited one, in that his Originating Summons was on issue immediately for 30th July, 2001, although in the form it appears it does not capture all features of that type of Originating Summons.

The Originating Summons herein was filed together with a supporting affidavit to which were annexed eleven exhibits. An inter partes Originating Summons, even an expedited one, ought to provide for acknowledgment of service by the defendant. The normal period allowed for this is fourteen days from service of the Originating Summons. (See: O 12 rule 5(a) and Note 12/5/1 R.S.C.)

The present Originating Summons did not make any provision for acknowledgment

contrary to the format appearing in Form 10 Appendix A. It was also not accompanied by a form of acknowledgment of service contrary to Order 10 rule 1(6) as read with O 10 rule 5 of the Rules of Supreme Court.

On the return date the plaintiff filed three documents before proceeding to argue the Originating Summons. The documents filed were:-

- (a) the consent of the next friend to act as such;
- (b) the Certificate of a Legal Practitioner as to the next friend of the infant plaintiff; and
- (c) the affidavit of service of the Originating Summons.

Reflecting on all that has transpired in this case it strikes me that this matter was heard before it was due and I am of the view that I will only be perpetrating the procedural flaws in it if I proceed to decide it as if all was well in it.

To begin with, as already pointed out, the Originating Summons did not, as it ought to have, make provision for acknowledgment of service by the defendant, and on service was not accompanied by the requisite form No. 15 of Appendix A as per O 10 r 5 of Rules of Supreme Court to enable the defendant acknowledge the said service. Indeed on the return date there was no acknowledgment of service. In terms of Order 28 rule 6 of the Rules of Supreme Court I needed first to be satisfied on the point of failure to so acknowledge service before I could entertain the plaintiff's application for an Order affecting the defendant in this case. I now think that I should not have allowed Counsel to argue on the Originating Summons without giving this provision and Order 32 rule 5 deeper attention. A question well worth asking in the circumstances may well be whether the defendant's failure to acknowledge service in this case (if so it is) is or is not due to the fact that the plaintiff did not provide for such as he was legally obliged to.

Leaving this aside the situation is compounded by the fact that as per the affidavit of service filed first before the hearing, the Originating Summons herein was served by post on 11th July, 2001. Under Order 10 rule 1(3) of the Rules of Supreme Court service by post is deemed effective after the expiry of seven days from the date of postage if the documents have not been returned by the post, undelivered. In this case, therefore, the effective date of service of the Originating Summons was 18th July, 2001, which was only twelve days before the return date of 30th July, 2001. The meaning of this is that by the time this matter was being called for hearing the defendant had not exhausted its fourteen days of grace before acknowledging service. Now in this case there is no sign that the plaintiff made any applications or obtained any Orders to abridge time. Order 28 rule 1A lays down an elaborate timetable of how parties to an Originating Summons will exchange affidavit evidence where they are so inclined. Bearing in mind this calendar and the fact that the plaintiff got a hearing date that fell two days short of even the time permitted for acknowledging his Originating Summons it would not be far fetched to say that the plaintiff, procedurally speaking, was excessively in a hurry to be heard in this matter.

It is, as I have already indicated, my present view that this hearing took place at a time the matter was not yet ripe for hearing. The scenario at hand is that the plaintiff did not provide the defendant with information, as he was supposed to on the Originating Summons, that acknowledgment of service was necessary. He also did not, contrary to procedure, provide the defendant with the requisite means to effect such acknowledgment if so minded. Worse still the plaintiff on issue of the Originating Summons obtained such a near date for its hearing that there was not even enough time for the defendant to acknowledge its service within the time permitted by the law, let alone time for a comfortable exchange of affidavit evidence between the parties. The hearing was therefore bad and irregular.

Order 28 rule 4 of the Rules of Supreme Court provides for directions by a Court. In particular O 28 rule 4(2) allows the court to give such further directions as to the further conduct of the proceedings as will secure the first, expeditions, and economical disposal of the same where a court has not disposed of an Originating Summons at a hearing. I heard this Originating Summons on 30th July, 2001 but did not altogether dispose of it as a ruling was pended. I have found and held that the hearing was premature and hurried and therefore irregular. In the circumstances I feel that the defendant is liable to suffer a high degree of prejudice as a direct consequence of the errors I have just pointed out if I were to all the same first proceed with a determination of the matter. Accordingly of my own motion under Order 2 rule 1(2) of the Rules of Supreme Court hereby direct the setting aside of the hearing of 30th July, 2001. Further in terms of O 28 rule 4(2) I direct that the plaintiff should amend his Originating Summons by making it compliant with Form No. 10 in Appendix A of Vol. 2 of the Rules of Supreme Court by providing for acknowledgment of service within 14 days of its service. Further the plaintiff is to ensure that the appropriate acknowledgment of Service form is served along with the Originating Summons on the defendant. Lastly I direct the plaintiff to bear in mind the time limits envisaged by Order 28 rule 1 A in securing a return date, if he remains inclined to have such on issue of amended Originating Summons. I order accordingly.

Made in Chambers the 10th day of August, 2001 at Blantyre.

A.C. Chipeta

JUDGE