

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 329 OF 2004**

BETWEEN

FRANCIS D. MAJOH.....PLAINTIFF

-AND-

NASON D. KONYANI.....DEFENDANT

CORAM: MANDA, **SENIOR DEPUTY REGISTRAR**

Chilenga for the defendant

RULING

This was an application to set aside default judgment which was taken out under Order 13 rule 9 of the Rules of the Supreme Court. The application was made on the grounds that the defendant has a defence on the merits and that the judgment was irregularly obtained.

In his submission Mr. Chilenga, appearing for the defendant informed the court that the defendant was not properly served with the writ of summons. Counsel pointed out to the court that the defendant's address is Box 66, Kapiri, Mchinji and not Kasinje Trading Centre P.O. Kapiri, Mchinji, which is the address indicated on the Writ of Summons. It was therefore Counsel's contention that the Writ of Summons did not reach the defendant and that as such there was no proper service. It was on this basis that Counsel contended that the default judgment that was entered by the court was irregular and that it should be set aside.

On the ground that the defendant has a defence on the merits, I did duly consider the law that Counsel had cited and indeed I do agree with him. Especially with regard to the description as to what constitutes a meritorious defence. Indeed having looked at the defence that was filed by the defendant, I was of the view that the same does seem to have some prospects of succeeding. As such therefore I would allow that the default judgment should be set aside and that the matter should proceed to trial.

On the other hand, I did note that there was an endorsement on the back of the Writ of Summons in the name of Mc Donald D. Konyani, which was dated 28/8/2004. According to Counsel for the defendant, this gentleman happens to be the defendant's brother. From the endorsement, it would seem that Mc Donald Konyani did acknowledge service on behalf of his brother the defendant. Indeed it was in view of this that I did reserve my ruling on this matter. The question I did ask was whether in the circumstances it could be said that there was due service on the defendant. When asked to address the court on this point, counsel informed the court that at the time that the brother was signing the Writ of Summons, he was not acting as the defendant's agent and that as such it could not be said that there was personal service on the defendant. Counsel went further to inform the court that despite fact that the brother did sign for the Writ of Summons, he never brought the same to the attention of the defendant. Counsel thus did reiterate that the default judgment was irregular. Because of this apparent irregularity, the defendant did argue that the plaintiff should bear the sheriff fees and expenses in terms of Section 44(3) of the Sheriff Act.

Order 65 rule 2 does indeed provide that personal service has to be effected by leaving a copy of the document with the person to be served. A writ of Summons is one of those documents of which personal service is requisite. This of course does not affect the power of the court to dispense with the requirement of personal service. Of course this power of the court can only be exercised in particular circumstances which the plaintiff in this case ought to have demonstrated. One such situation is where the defendant was or did try to avoid being served. In this instant, it was not stated as to why the plaintiff decided to serve the defendant's brother. Indeed this might have to do with the fact that the plaintiff never made an appearance at the hearing. At the same time one can not rule out the possibility that the fact that the plaintiff was acting in person might also have some effect on the way that he can pursue a case, this is especially when it comes to the High Court, where the rules of procedure are more complex for an ordinary individual to fully appreciate. This however does not remove the requirement that service must be on the defendant and that it can only be made on his wife or his agent at his request (see **Montgomery & Co v Liebenthal & Co** [1898] 1 QB 487). In this case therefore I do concur with Mr. Chilenga that it was not shown that Mr. Mc Donald Konyani was the defendant's agent or that he accepted service at the request of the defendant. It is thus on this basis that I find that the default judgment is indeed irregular and I do accordingly set it aside.

Since the Writ of Summons was not properly served, rendering the default judgment irregular, the plaintiff, in terms of Section 44(3) of the Sheriff Act, will have to bear the sheriff fees and expenses.

Made in Chambers this.....day of.....2004

K. T. MANDA
SENIOR DEPUTY REGISTRAR