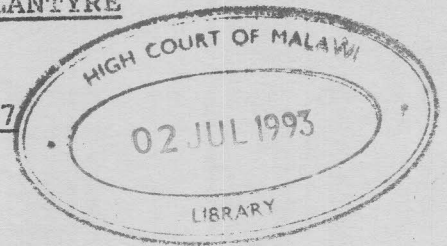


IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.628 OF 1987



BETWEEN:

NATIONAL BANK OF MALAWI PLAINTIFF

AND

KULANDA SOMANJE AND OTHERS DEFENDANTS

CORAM: BANDA, J.

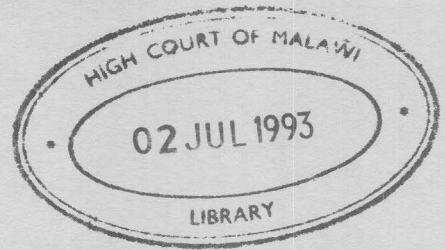
Msaka of Counsel for the Appellant
Chatsika of Counsel for the Respondent
Kadyakale, Law Clerk

RULING

This is an application by Mrs. Elizabeth Somanje to vacate the order of committal which the learned Chief Justice granted on 25th March, 1988.

Mr. Msaka, who appeared for Mrs. Somanje, has submitted that the order for committal was irregularly obtained in that the procedure laid down in Order 52 of the Supreme Court Practice was not followed. Mr. Chatsika on the other hand has contended that the order for committal was proper and that there is nothing irregular about it. Mr. Chatsika doubted the authenticity of the signature of a Commissioner for Oaths on the affidavit in support of the application. The only ground advanced for that doubt was that there were two J.M. Chirwa and it was not clear which one of them was Commissioner for Oaths. I do not think that Mr. Chatsika was serious in making that submission and, to be fair to him, he only made it as a passing remark.

It is clear that under Order 52/2 of the Supreme Court Practice no application for an order of committal against any person may be made unless leave to make such an application has been granted. The application for such leave is made ex-parte. There is some reference at the hearing of the application on 25th March that an application for leave was being made. But the ex-parte application made it clear that it was an application to commit the respondent to prison. I do not think it would be proper to regard that application as being both the application for leave and an application for committal. However, even if it is possible to make that assumption, the same order 52/2 also provides that once leave to apply for an order has been granted the application itself



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for an order of committal must be made by motion and that there must be at least eight clear days, unless the Court directs to the contrary, between the service of the motion and the day for the hearing of the motion. Order 52/2 further provides that the Notice of Motion together with a copy of the statement of facts and the affidavit in support of the application for leave must be served personally unless the case falls under the exception. The only exception which the Order cites is where the respondent is evading service. Mr. Chatsika contended that this exception is not intended to be exclusive or exhaustive. He argued that there must be other circumstances where the dispensation of notice may arise. He submitted that the present case was one such case where the Notice was dispensed with because the respondent was wasting the assets.

There can be no doubt, in my judgment, that Mr. Msaka is right when he submits that the proper procedure was not followed at the point when an application for an order of committal was made. The rule requires that an application for leave to make an application for committal should be made. There is no evidence on record to show that such an application was made and Mr. Chatsika did not suggest that such application was, in fact, made. It may well be that this is one of the points which Mr. Chatsika had in mind when he stated that he was conceding some of the points which Mr. Msaka had raised. It is equally clear that the application for an order of committal was ex-parte and was not served on Mrs. Somanje. Mr. Chatsika, while conceding that no service was made, contends that this was so because this case is a proper one in which Notice was dispensed with. Here, again, there is no order to dispense with personal service. I am satisfied that here too there was a failure to follow the procedure which is laid down by law.

It is generally accepted that the process by way of committal is a very serious remedy as it involves the deprivation of a subject's liberty. It is, therefore, a remedy which should not be lightly used and certainly should not be employed unless there are no other remedies or the available remedies have been exhausted. It must be remembered that casual or unintentional disobedience to an order will not justify an order of committal. The court must be satisfied that the disobedience was intentional and therefore contumacious. It must, indeed, be difficult for a court to be so satisfied without hearing the party sought to be committed. It is a fundamental principle of natural justice that the other party to a proceeding should be given the opportunity to be heard. Consequently it is my considered view that Mrs. Somanje should have been given the opportunity to show cause why she could not be committed. I find, therefore, that there was a failure to obtain leave to apply for an order of committal; there was also a failure to serve the application for order of committal because there was no order to dispense with such service; and lastly there was a serious breach of a principle of natural justice in granting an order of committal before Mrs. Somanje

was given the opportunity to be heard. This is more so because of the serious allegations which are made in the affidavits on the record which if true would change her status and that of her children and would have the effect of bastardizing them. I am therefore satisfied and I find that the order of committal was not regularly granted because the procedure laid by law was not followed. I would, therefore, order that the order of committal which was granted on 25th March, 1988 be vacated.

MADE in Chambers this 12th day of April, 1988 at
Blantyre.


R.A. Banda
JUDGE

